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No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LOPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On The Petition

QUESTIONS PRESENTED

1. Whether the trial court's dismissal of three jurors without taking any steps to cure the problems that led to their dismissal falls within the manifest necessity exception to the Double Jeopardy Clause?

2. Whether the trial court's declaration of a mistrial upon the mere finding of a "distinct possibility" of jury tampering barred, on Double Jeopardy grounds, retrial of petitioners?

LIST OF PARTIES

Apart from petitioners, one other indicted party, Michael Coiro, was severed, pursuant to Fed. R. Crim. P. 14, prior to trial.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LoPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Angelo Ruggiero, Gene Gotti, John Carneglia, Edward Lino, Mark Reiter, Joseph LoPresti, Anthony

Moscatiello, Oscar Ansourian, Anthony Gurino and Cesar Gurino, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 26, 1988, affirming the denial of petitioners' double jeopardy motion.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-63a. The order of the Court of Appeals denying petitioners' petition for rehearing appears in the Appendix at pages 64a-65a. The opinion of the United States District Court for the Eastern District of New York (Costantino, D.J.) ordering a mistrial, appears in the Appendix at pages 66a-87a. The opinion of the United States District Court for

the Eastern District of New York (McLaughlin, D.J.), denying defendants' motion to dismiss the indictment, appears in the Appendix at pages 88a-143a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on April 26, 1988. A timely petition for rehearing was denied on June 1, 1988. The Honorable Thurgood Marshall of this Court has granted petitioners an extension of time, until August 30, 1988, to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Abney v. United States, 431 U.S. 651 (1977).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution:

> No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

This narcotics and obstruction of justice case began in April of 1987, with the selection of an anonymous jury before the Honorable Mark A. Costantino. Trial commenced on June 1, 1987. On October 22, 1987, the government, unbeknownst to the judge and the defense, obtained the names and addresses of the jurors and initiated a grand jury investigation of "information" that "the defendants" had tampered with the jury. (Affidavit of FBI Agent John Flanagan, A 47)[1].

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[1] Numbers in parenthesis preceded by "A" refer to the Joint Appendix submitted to the Court of Appeals; while those preceded by "Tr." refer to the trial transcript.

A. The First Voir Dire

On January 8, 1988, the government made an ex parte application before Judge Costantino to individually voir dire the jury, in camera. This request was based on the Flanagan affidavit (A 47-71), an affidavit of FBI Agent Martin Towey (A 72-75) and a memorandum of law (A 76-101). Three days later, Judge Costantino, without notice to defense counsel, granted the motion and conducted an in camera, ex parte voir dire. (See Tr. of 1/11/88, A 102-137) The sitting jurors unanimously and unequivocally denied any actual or attempted contact. (Tr. of 1/11/88 at 10-36, A 111-137)

On January 12, 1988, defense counsel were finally informed of the government's application and the resulting voir dire, and provided a transcript of the in camera proceeding, along with the

government's memorandum and the Flanagan and Towey affidavits. (A 138) Over defense objection, Judge Costantino granted the government's motion for a hearing on what he called the defendants' efforts to tamper with the jury. The defense also objected to the ex parte nature of the government's motion and the secret voir dire. (Tr. 10179-10189)

B. The Hearing

Three days of public hearings were conducted into the government's allegations of jury tampering.[2] What follows is a summary of the evidence produced.

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[2] Both the government and defense counsel requested that the courtroom be closed. (Tr. 10158, A 144) The Court denied that request. (Tr. 10178)

1. Gary Barnes

Former juror number 2, Gary Barnes, was the government's first witness. Barnes testified that, after being excused as a juror because it was learned he was not an American citizen, he received a telephone call at work from Mel Rosenberg, a fellow employee. Rosenberg asked to speak to him in person. (Tr. 10237-10243) Since REFCO, the brokerage house for which they worked, recorded all employee calls, a tape of that conversation (Government Hearing Exhibit 2) was available and played for the Court. (Tr. 10243)[3] Thereafter, Barnes met with Rosenberg in a REFCO conference room.

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[3] The transcript of that conversation (Government Hearing Exhibit 2A) is in the Joint Appendix. (See A 162-164)

According to Barnes, Rosenberg asked if he was on the "case in Queens"; Barnes replied he was on a case in Brooklyn, not Queens. Rosenberg insisted that the case in Queens had been going on for some time and that he wanted to know how the jury was feeling about it. He mentioned the initials "GG" and then the name Gene Gotti. Although Barnes kept asserting that he did not know what Rosenberg was talking about, Rosenberg said there could be a new BMW for him. Barnes remained steadfast and denied being a juror in that case. (Tr. 10246-10255)

Barnes also testified to a chance encounter during his jury service with a private investigator named William Sewell. Barnes had seen Sewell, a black man, in the spectator section of the courtroom "more than once", and "thought" he had seen Sewell on one occasion

speaking to a defense lawyer in the rear of the courtroom. From this, he concluded that Sewell was a chauffeur. (Tr. 10222-10227, 10289)

One day in approximately July of 1987, Barnes was to be driven home by a fellow juror. After court, they went to a municipal parking lot, where Barnes saw Sewell. (Tr. 10227)[4]

> I was walking in the parking lot with a fellow juror. He came by. I asked him, "Are you a chauffeur?" I go, "What are you, chauffeur?" He didn't hear me. I said "Never mind." He said "I'm a private investigator." (Tr. 10227-10228)

Sewell appeared to be offended by Barnes' question and just "kept going" to his car, which was parked on an upper level. (Tr. 10230) Sewell never approached

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[4] Curiously, this juror who supposedly had accompanied Barnes was left out of the picture painted by the government.

Barnes, nor did he try to talk about the case. (Tr. 10292)

2. Agent John Flanagan

Special Agent John Flanagan of the FBI testified about his December 22, 1987 interview of Mel Rosenberg. At first, Rosenberg denied knowing Gene Gotti. Flanagan then asked Rosenberg if he had ever expressed an interest in Gene Gotti's trial. Rosenberg said he knew what Flanagan was "getting at" and essentially repeated Barnes' version of the events, but called it "a lark." (Tr. 10304-10310) He denied knowing any of the attorneys about whom Flanagan had asked. (Tr. 10311-10312)

Flanagan also testified to serving William Sewell with a grand jury subpoena on November 10, 1987; Sewell's attorney was Charles Carnesi. (Tr. 10312-10313) Over defense objection, Flanagan was

asked to read selected portions of Sewell's grand jury testimony.[5] In these portions, Sewell stated he had spoken to Angelo Ruggiero about the subpoena. (Tr. 10325-10330)

Flanagan also identified and played for the Court additional recordings of Mel Rosenberg's December 22, 1987 telephone conversations at REFCO.[6] First, Rosenberg called "Anthony LNU" in an attempt to obtain a phone number. (A 165-166) Later that day, he called someone identified only as "Big A" and

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[5] The defense requested, but was denied, access to a complete transcript of Sewell's grand jury testimony. (Tr. 10323-10324). A redacted version of that testimony (A 176-255) was provided after the hearing.

[6] Transcripts of those conversations were submitted as Government Hearing Exhibits 12A and 13A. (See A 165-175)

arranged to meet him. Then, Rosenberg called an unknown female at attorney Brian Levinson's office, and asked if Charlie Carnesi had called. Rosenberg also spoke to Carnesi, who told him that he had not gotten in touch with Levinson. Finally, Levinson called Rosenberg to arrange a meeting.

At the end of Flanagan's testimony, a photograph of the house of juror no. 4, located in the immediate vicinity of the houses of two individuals claimed by the government to be organized crime members, was stipulated into evidence, under seal to avoid publicity. (Tr. 10364-10366)

3. **Agent Martin Towey**

The government's last witness, FBI Agent Martin Towey, added nothing to the hearing. Instead, over defense objections to the triple hearsay nature of his testimony, he merely affirmed the

statements made in his January 7, 1988 affidavit in support of the government's motion to voir dire the jury. That affidavit had alleged that, according to a confidential informant known to Special Agent Robert Liberatore, "the defendants" had obtained the license plate numbers of five jurors and that at least one black juror had been compromised. (Tr. 10378-10380) On cross-examination, Towey admitted that he had no first-hand knowledge of this information, but had learned of it from Liberatore. Liberatore, in turn, supposedly had gotten the information from a confidential informant unknown to Towey. Although Liberatore was present in the courthouse that day and available to testify, the government did not call him to testify. (Tr. 10383-10384)

C. Sequestration

Although the investigation into allegations of tampering had been ongoing since October 22, 1987, and had been brought to the attention of the trial judge on January 8, 1988, the jury remained unsequestered until January 14, 1988 (Tr. 10360-10362), and the parties were kept in the dark about its status. Thus, when confronted, on January 13th, by frustrated defense counsel who insisted that "we are entitled to at least know [whether the jury was sequestered]" (Tr. 10179), Judge Costantino responded:

> The jury itself has not been sequestered but conditions were established by the Court with the stenographer in the jury room. They were again instructed not to view any television, listen to any radio or read any newspapers when it becomes apparent that the articles or the viewing of those matters might somehow be related to the issue before the Court.

> As the Court has done in the past, the Court accepted their acknowledgement that they would under such circumstances not in any way listen or view anything that might itself be referable to this proceeding. (Tr. 10179)

The next day, Judge Costantino, without notice to counsel, told an unhappy jury it would be sequestered. (Tr. 10360-10362)

D. The Second Voir Dire

On January 15, 1988, Judge Costantino announced his intention to voir dire the jury a second time. (Tr. 10397) Despite defense requests that this examination be conducted in chambers, the judge, with flagrant disregard for the obvious consequences, voir dired the jury in a courtroom packed with newspaper and television reporters, sketch artists and the public. The jurors were confronted not only with such an imposing gallery,

but with no lesser personages than the United States Attorney himself and his chief assistant, along with another assistant and two FBI Agents. Notably absent from this array of people at the prosecution table were the attorneys who had represented the government for the previous nine months.

Fearful of the intimidating effect which this display of government brass and media interest was bound to have on the jury, defense counsel sought to have the second voir dire, like the first, conducted in chambers. Judge Costantino's only response was that he would "guarantee they won't be scared." (Tr. 10400) When defense counsel pressed this point (Tr. 10431-10435, A 256-260), the judge insisted that he was, "doing it [his] way." (Tr. 10435, A 260)

THE COURT: I can't do that.

> No, it is too far into this case for that business. I am not going to be the victim nor will I be the victim or be the one attacked in a trial ever in my life, and I will not do it. Everything I do is open and aboveboard. It is going to be open and aboveboard. I don't care who is involved. I say this for the record. I don't care who is involved because I don't like what innuendos [sic] they say of Mark Costantino. I think it is disgraceful what they say, and I don't want it and I won't let it happen to me. I don't care what you do with those guys down there. I don't care if the whole bunch of them drop dead right now, but they are not going to-- you couldn't convince me in a million years.
>
> MR. HOFFMAN: I have one other point.
>
> THE COURT: You can protect them all you want but you are not going to do it through me. (Tr. 10399; emphasis added)

Thus, based on a wholly irrelevant fear for his reputation, combined with profound disregard for the fate of the defendants and their rights, Judge Costantino conducted the second voir dire

in open court, birthing a mistrial in the process.

Prior to the second voir dire, the court notified counsel that jurors no. 4 and 11 had expressed "concern" about their ability to serve. Before hearing argument from the defense, Judge Costantino declared that these jurors would be excused. (Tr. 10395) In addition, the government asserted that another juror (not four or eleven) had been compromised, but refused to divulge that juror's number. (Tr. 10399-10401)

The defendants refused to acquiesce to the government's demand that it either object or consent to the removal of jurors no. 4 and 11. Instead, they insisted on receiving further information about the possibly compromised juror before taking a position. Absent such information, they argued, the government

would have a "pocket veto" over the continuation of the trial, since, if the Court excused jurors four and eleven, only twelve jurors would remain with the fate of this other unspecified juror yet to be decided. Again, they emphasized that they did not want a mistrial. (Tr. 10403-10404)

After conferring, the defense proposed that the government reveal, in camera, the number of the juror allegedly compromised, along with the basis for its belief. Counsel added that, if the government was concerned about the dissemination of this information, they would agree not to tell the defendants and that all defendants would waive their right to such information. (Tr. 10411-10412) Reluctantly, the government agreed to provide to the court and counsel under seal both the juror's

number and "the basis of why we are saying it." (Tr. 10414) In camera, however, it provided the juror's number, but refused to state the facts underlying its claim. (Tr. 10420) Incredibly, the prosecutor stated he had received the information about the allegedly compromised juror from the FBI just 40 minutes prior to revealing the juror's number. (Tr. 10419-10421)[7]

Over defense objection (Tr. 10427-10430), Judge Costantino proceeded with

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[7] It should be noted in this regard that the January 7th Towey affidavit stated that at least one of the black jurors had been compromised and that the FBI knew of this "long before the approach of former juror no. 2..." (A 74) Since the government admitted that it was aware of only one compromised juror, whose number it revealed in camera on January 15th, and who is black, the Towey affidavit, if true, necessarily refers to this juror and demonstrates that the information was available "long before" the government came to Judge Costantino in January.

the second voir dire in open court.[8] (A 256-300) All jurors repeated that no one had approached them or attempted to compromise them in any manner. (Tr. 10438-10471, A 263-296)

The second voir dire also included questions about publicity. Juror no. 4 told of coming home after the first day of hearings (about which he was supposed to be ignorant) and being confronted by his father about media accounts. In this regard, all juror no. 4 stated was that "at this point [he didn't] know whether [he] c[ould] be impartial." (Tr. 10445, A 270) Juror no. 7 told the Court that the jurors were "wondering" what was going

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[8] When the jurors were brought into open court, at least two expressed a desire to have the proceedings in chambers. (Tr. 10438, A 263) The court expressed an initial willingness to proceed in chambers, but then changed its mind. (Tr. 10439, A 264)

on, but that she could continue to be fair and impartial. (Tr. 10449-10450, A 274-275) Juror no. 10 also referred to the jury's speculation about what was going on, but said it would not affect his ability to continue. (Tr. 10457-10458, A 282-283)

Juror no. 11 likewise said that the jury was "wondering" what was going on (Tr. 10459-10460, A 284-285) and told the court (as she had previously in chambers) that someone she knew had found out what case she was on, making her feel "uneasy." (Tr. 10460, A 285) That, however, did not impair her ability to be fair and impartial and would not affect her judgment. (Tr. 10461, A 286) This juror was re-voir dired by the court, and reiterated that she could be fair and impartial. (Tr. 10469-10470, A 295-296) Finally, Juror no. 12 stated that she had

guessed what the proceedings were about and, consequently, it would be difficult for her to be fair and impartial. (Tr. 10462-10463, A 287-288) In a further voir dire requested by the defense, she said she had "put pieces together" and accordingly, it would be "very, very hard" for her to be fair. (Tr. 10470-10471, A 296-297)

The surprise of the second voir dire was juror no. 8, long recognized by both the court and counsel as an extremely intelligent and attentive juror. (Tr. 8812-8814) After referring to a "general undercurrent" among the jurors as to what was taking place (Tr. 10450, A 275), and mentioning a brief exposure to possible television publicity (which would not impair his judgment), this juror announced his surprise (after nine months of trial) that he was sitting on a

narcotics case.[9] Given personal experience with members of his family and drugs, he claimed could not be fair and impartial. (Tr. 10452-10453, A 277-278)

E. The Proceedings Following the Second Voir Dire

Since Judge Costantino had determined to excuse jurors 4 and 11 (but had not yet actually discharged them), the loss of any additional juror would force a mistrial because less than twelve would be left.[10] In an effort to save the

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[9] In this regard, it should be noted that the prosecutor began his opening by stating: "This case, ladies and gentlemen, is about drug trafficking." (Tr. 843) The government's case began with evidence of a seizure of two kilograms of heroin. The heroin was marked in evidence and displayed to the jury.

[10] It should be noted that the defense had unsuccessfully pressed Judge Costantino to seat six, rather than just four, alternates.

trial, the defense asked Judge Costantino to resolve by curative instructions the unease of the jurors who had expressed doubt about their continued ability to serve. For example, if the jurors who had merely expressed doubts about their ability to be fair were to be told about the cost of a re-trial to all parties, etc., any doubts or biases might be diffused, thus ensuring their continued service.[11] The defense request was denied, with Judge Costantino maintaining that he could not cure "anything", including his own "sore leg." (Tr. 10471-10472, A 297-298)

Court adjourned until January 19th to give the government an opportunity to

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[11] Indeed, Juror No. 11, who had earlier expressed reservations about being fair, changed her attitude by the second voir dire and did not have to be excused.

file motion papers. (Tr. 10472, A 298) The defense response was due on January 21, 1988. (Id.) During the afternoon of January 19, 1988, while awaiting receipt of the government's papers, defense counsel were notified that a special en banc panel of the Judges of the Eastern District had been scheduled for January 21, 1988 and that the defendants' responsive papers (see A 301-354) were to be filed with the panel by that date. No other information was provided.

On January 21, 1988 the en banc panel met. The government and defense counsel presented their respective positions. With the defense still steadfast in its desire to proceed with the trial, the government asked for a mistrial.

The following day, Chief Judge Weinstein, writing for the special panel, found, inter alia: that the grand jury

investigation into jury tampering was bona fide; that there had been "good reason" for the government to bring to the trial judge's attention "the possibility" of jury tampering; that any publicity was not the fault of the government; and that these three findings were made "on the record now before us without prejudice to any contrary findings on the basis of any evidence, hearings and argument which may be advanced" in the future. (See A 362-363; emphasis supplied)

On January 25, 1988 Judge Costantino found "manifest necessity" to declare a mistrial. (See A 67a-88a) After reading his opinion in open court, he brought in the jury, excused jurors 4, 8 and 12 and declared the mistrial. (Tr. 10523-10525)

The matter was thereafter re-assigned to the Hon. Joseph M. McLaughlin, who,

after hearing from the government and defense, severed the case into four segments. The first segment, involving only the defendants Ruggiero, Carneglia and Gotti, ended in a jury deadlocking.

Shortly after the reassignment, the government sought to have the defendant Gotti's bail revoked based upon its allegations of jury tampering. Finding that the record before Judge Costantino "ha[d] been pretty much trashed" because the government had "back[ed] off from a lot of things," Judge McLaughlin ruled there was insufficient evidence to believe that defendant Gotti had committed a crime while on bail and, denied the remand motion. (Tr. of 2/8/88 at 52-58, A 428-434) Indeed, one of the significant allegations from which the government "backed off" during the bail hearing was the claim that a sitting

juror had been compromised. (Tr. of 2/8/88 at 42, A 418) (See also discussion at pp. 47-48, infra.) In any event, petitioners' motion to dismiss the indictment on double jeopardy grounds was denied. (89a-143a)

THE COURT OF APPEALS DECISION

In affirming the denial of petitioners' double jeopardy motion, the Court of Appeals made two related findings. First, the Court held that Judge Costantino's dismissal of three jurors, leaving only eleven, created a "manifest necessity" for a mistrial. (29a-33a) Second, the Court reaffirmed and expanded its holding in United States v. Mastrangelo, 662 F.2d 946 (2d Cir.), cert. denied, 456 U.S. 973 (1982),[12]

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[12] We refer to two Mastrangelo opinions in this petition: United States

(continued...)

concluding that the Double Jeopardy Clause is not offended by a mistrial based upon the District Court's finding of a "distinct possibility" that the defendants were involved in jury tampering. (25a-29a)

In a strongly worded dissent, Judge Lumbard noted that "[h]owever heinous the crimes for which the defendants stand accused, and however dispicable their reputations, they are no less entitled to the protections of the Constitution afforded by the prohibition against double jeopardy." 63a. In essence, Judge

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[12](...continued)
v. Mastrangelo, 662 F.2d 946 (2d Cir.), cert. denied, 456 U.S. 973 (1982), and United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), cert. denied, 467 U.S. 124 (1984). The second opinion, cited infra at 43, was an appeal after remand. When we refer to Mastrangelo, we are referring to the first case unless otherwise stated.

Lumbard concluded that Judge Costantino never determined that the jurors were incapable of rendering a verdict based solely upon the evidence presented in the case.

REASONS FOR GRANTING THE WRIT

I

THERE WAS NO MANIFEST NECESSITY REQUIRING A MISTRIAL

Quite simply, a mistrial here was unnecessary, or at least premature, because the trial court did not have sufficient grounds for dismissing the three jurors. In making this claim, we rely upon Judge Lumbard's eloquent dissent:

> A mistrial was declared on January 22, 1988, after more than eight months of a trial which began with the selection of the jurors in April 1987 and the presentation of evidence by the government commencing June 1. In light of the length of the

government's case and the serious nature of the charges against these defendants, it was the paramount duty of the district court to keep the trial going until the jury brought in a verdict. Without a determination by the court that the jurors were incapable of rendering a verdict based solely upon the evidence presented in the case, the trial should have continued until the jurors either reached a verdict or reported a hopeless failure to agree. The district court made no such determination.

The evidence presented to the court concerning the approach of dismissed juror Gary Barnes, and the attempts to identify the remaining jurors, certainly required the immediate attention of the court. Although the in camera ex parte examination of the remaining jurors (at which none of the counsel were present) by Judge Costantino disclosed that contact with the jury had occurred, it did however lead the court to believe that some jurors were uneasy. Up to this time, the jurors had not been sequestered.

Judge Costantino next proceeded to conduct an examination of the jurors in open court with the defendants, counsel and the public present. In my view, the record shows no

good reason for this decision. The open court examinations led the court to dismiss three jurors, numbers 4, 8 and 12, without any showing that as a result of any improper activity by the defendants, they could no longer render a verdict on the evidence in the case.

The testimony of those three jurors fell far short of providing a basis for disqualifying any of them. Juror number 4 told the court in camera that he was not sure that he could continue to serve because his father had mentioned to him that there had been some allegations of jury tampering. Later, in open court, he said he still felt the same way and "did not know whether [he could] be impartial."

Juror number 8 disclosed that his wife had heard something on the radio about jury tampering and a mob trial. In answer to the court's question concerning whether in his judgment he had been impaired, he replied that "his judgment had not been impaired." However, he then volunteered that as the trial progressed, and the issue of drugs became central to the case, that he could not be fair and impartial because of immediate family members' involvement with drugs.

Juror number 12, who denied being contacted about the case, said that he had an idea "of what this is all about and it is kind of changing my input as to whether I can be impartial or not." The questioning ended with him saying that "because of recent events and not because of the trial and evidence that has been submitted" he would find it difficult to be impartial.

In my view, it does not appear from the record that any one of the three jurors could not have decided the case based on the evidence at trial. That is the ultimate test of the "manifest necessity" for a mistrial. Arizona v. Washington, 434 U.S. 497, 505-06 (1978). By the time they began their deliberations the jurors would have been reminded of their duty to decide the case based solely on the evidence presented many times during the proceedings--first by the judge during jury selection, then by both counsel in the summations, and again by the judge in his charge. Why were those three jurors not reminded of this duty before they were dismissed? Before taking the extraordinary step of declaring a mistrial, it was the duty of the court to urge the jurors to serve and consider the case solely on the evidence.

The examination of the jurors in open court in view of all that had taken place during the preceding three days could only have resulted in making them more uneasy about what was going on. Jury service in such a long trial is at best a strain and entails many personal sacrifices and is compensated largely by the fulfillment of an important civic duty. With few exceptions, those called for jury duty respond to the challenge. They accept the instructions of the judge. Countless times in our opinions, we have reaffirmed our belief that jurors can be relied upon to follow the instructions of the court. Richardson v. Marsh, 107 S.Ct. 1702, 1707 (1987); United States v. Teitler, 802 F.2d 606, 617 (2d Cir. 1986). In addition, any conceivable prejudice that may have been caused by the jury hearing about the alleged jury tampering from the media could have been cured by a specific jury instruction. United States v. Feldman, 299 F.2d 914, 917 (2d Cir. 1962).

Here we have not a shred of evidence that any one of these three jurors could not have laid aside their apprehensions and rendered their verdict on the evidence. The judge never asked them to do that and never inquired about whether they could

do so. On the contrary, in the setting in which the voir dire occurred, it surely must have seemed to all three of these obviously uneasy jurors that they were being offered a way out of continuing the service which had become onerous and the continuance of which may have had unpredictable consequences.

Even assuming that dismissing the three jurors was proper, the record fails to show that the court took every reasonable step to continue the trial with a lesser number than 12. Indeed, before the court made its decision to dismiss the jury, it should have inquired of the defendants whether they would agree to be tried by a jury of less than 12. Neither the court nor the government inquired of the defendants or suggested such an inquiry. Although it is doubtful whether the defendants would have agreed, at the very least, the court should have made every attempt before deciding to dismiss all three of the jurors. Keeping any one of the three jurors would have saved the jury and allowed the trial to continue.

The question was not whether any juror was still "impartial"-- whatever that ambiguous term might mean to the jurors. The question was whether there were

enough jurors that could decide the case on the evidence. At the point a mistrial was declared, only the government's case had been presented to the jury. Thus, it seems more than likely that, at that point, before any defendants' evidence and before summations of counsel, many of the jurors would have formed some opinion. Even without rumors of jury tampering, they may have quite naturally no longer been "impartial."

There was no showing that any remaining member of the jury had been tainted or even approached. There was no showing that as a result of the inquiry by the court that any member of the jury could not have rendered a verdict on the evidence in the case. This, combined with the judge's remarks about his displeasure regarding the trial, the mishandling of the voir dire, and his failure to take reasonable measures to retain a jury which could have reached a verdict, leads me to conclude that there was no showing of "manifest necessity" to justify the declaration of a mistrial.

(54a-63a)

II

THE "DISTINCT POSSIBILITY" TEST EMPLOYED BY THE SECOND CIRCUIT EVISCERATES THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE

As Judge McLaughlin correctly observed,

> The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Once jeopardy attaches, a defendant possesses a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949).

(110a; emphasis supplied) See also Oregon v. Kennedy, 456 U.S. 667, 672 (1982); Arizona v. Washington, 434 U.S. 497, 503 (1977).

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden of the accused, prolongs the period in which he is stigmatized by an unresolved accusation of

> wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

Arizona v. Washington, supra, 434 U.S. at 503-504.

Applying the evidentiary standard of United States v. Mastrangelo, supra, 662 F.2d at 952 -- i.e., the "distinct possibility" of a defendant's complicity -- Judge Costantino found that a mistrial should be granted because there was a "very high degree of likelihood that the [jury] panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants." (73a) Stripped to its essentials, this holding is nothing more than the bootstrapping of innuendo upon suspicion, and means only that there might be some chance that an unspecified juror or jurors, who at some point constituted part of the panel in

this case, might have in some way been affected by illegal conduct tangentially, but not necessarily causally, related to an unspecified defendant or defendants. Such far-fetched conjecture cannot withstand close scrutiny.

The Second Circuit affirmed this finding, holding that the Mastrangelo test applies whenever it is necessary "to avoid a mini-trial which could last weeks or months and maximize the risk of alerting the jury to allegations of misconduct." (27a)

Petitioners respectfully submit that the Mastrangelo test should not have been employed, both because the holding of that case is limited to its very peculiar facts and because, if it were to become the norm, the "manifest necessity" standard would be eviscerated.

1. Mastrangelo Is Not a Case of General Application and Is Substantially Limited to Its Own Facts.

At the outset, it must be noted that both the defendants and the government took the position that the government had to prove tampering by a fair preponderance of the evidence before "manifest necessity" could be found. This was not surprising, since the majority opinion in Mastrangelo concluded that the "distinct possibility" standard was appropriately used in that case because, in effect, there was no viable alternative. Through no fault of the government in that case, crucial evidence it needed to make its case against the defendant had been made unavailable. The government's chief witness, indeed its only witness, against Mastrangelo had been murdered hours before his scheduled

court appearance. The only question that remained was whether Mastrangelo had participated, directly or indirectly, in the murder of that witness.[13] In this regard, the Court reasoned that

> [i]t would ordinarily be impossible to make an investigation, have a hearing, and permit the introduction of evidence and cross-examination, with some resultant finding based upon whatever standard of proof might be appropriate, see e.g., Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972) (upholding the use of the preponderance-of-evidence standard as the burden of proof in a suppression hearing re the voluntariness of a confession), meanwhile suspending the trial in question. It is simply impossible in the situation of the killing of a key witness to reach any well founded determination about the true

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[13] Significantly, a mistrial was granted only as to Mastrangelo since there was no claim that his co-defendant had any involvement in the murder of the witness. United States v. Mastrangelo, supra, 662 F.2d at 952.

> course of events in an hour, a day, a week or even a month.

United States v. Mastrangelo, supra, 662 F.2d at 951.

The Mastrangelo Court then approved the "distinct possibility" rule because it recognized that, to make a determination under some greater evidentiary standard, would cause a delay in the trial that in and of itself would warrant a mistrial. Id. at 951-952 ("... the jurors' minds would no longer be fresh and, even worse, the reasons for the delay might have become evident to one or more of them."). In other words, as the post-remand panel noted, the Mastrangelo majority found an imperative need to apply the "distinct possibility" standard. United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984).

No such imperative need existed in this case. That, of course, is what even the government implicitly recognized when it asked Judge Costantino to apply the preponderance of evidence standard. Simply put, Mastrangelo should not be viewed as a case of general application. While its application may not require the actual murder of a government witness, there must be similarly exigent circumstances. Yet, if there were ever a trial where exigency played no role, this is that case. Indeed, repeated requests for severance by various defendants, predicated on the same concern for freshness of the evidence expressed by the Mastrangelo Court, were opposed by the government and denied by Judge

Costantino.[14] Moreover, through no fault of the defendants, the government's estimate of a two to three month trial was allowed to become a reality of a nine month case-in-chief, which generated 10,000 transcript pages. Given these circumstances, it would be ludicrous to suggest that the trial could have been jeopardized by a "well founded determination about the true course of events."

Moreover, unlike Mastrangelo, this was not a sudden event which shocked everyone and required immediate emergency action. See United States v. Mastrangelo, supra, 662 F.2d at 951 (Judge Weinstein observed, "everybody in this courtroom was shocked. [Defense

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[14] In contrast, Judge McLaughlin severed the case into four components.

counsel] was very upset."). Allegations of jury tampering first surfaced in October. While the government could surely not investigate a murder in a matter of minutes, hours or days, it could, and did, investigate these tampering allegations over several months, employing all of its investigative resources, including a grand jury. Indeed, two and a half months of investigation preceded the initial application to the District Court, and two more weeks followed before the mistrial was ultimately granted. Plainly stated, there was no exigency similar to that present in Mastrangelo.

Moreover, it must be emphasized that, in Mastrangelo, there was no question about whether James Bennett had been murdered. The factual determination to be made there was whether there was a

"distinct possibility" that Mastrangelo played a part in this spoliation of evidence. In the instant case, the threshold inquiry was whether the jury then hearing the case had actually been compromised. Mastrangelo does not stand for the proposition that the ultimate fact threatening the trial may be established by a "distinct possibility." Rather, it simply holds that once the threatening act -- the unavailability of the evidence -- is established, the determination, under those exigent circumstances, of whether a defendant played a part in it, may be made by applying the "distinct possibility" standard.

Since the government never proved (and, at the subsequent Gotti bail hearing, withdrew the allegation) that any sitting juror had actually been

compromised, the "distinct possibility" test should not have come into play. The naked claim that it was the petitioners who benefitted from a compromised juror or jury could not carry the government's burden where the very essence of the defense position was that they were winning the case on the evidence and, thus, wanted to explore any alternative to a mistrial.[15] In other words, jury tampering would have caused a mistrial, the very result which the petitioners vigorously sought to avoid.

2. Application of the Mastrangelo Standard Would Eviscerate the Manifest Necessity Requirement

United States v. Mastrangelo, supra, represents, as the majority of that Court found by necessity, a departure from the

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[15] Significantly, the retrial of defendants Gotti, Ruggiero and Carneglia ended with a jury deadlock.

"heavy burden" of proof recognized in Arizona v. Washington, supra, 434 U.S. at 505-506. Mastrangelo's unusual relaxation of constitutional safeguards should not become, as it would if used in this case, a matter of general application.

> It is axiomatic that the doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

United States v. Jorn, 400 U.S. 470, 485 (1971). Consequently, "the trial judge must 'take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgement,'" United States v. Tinney, 473 F.2d 1085, 1088-1089 (3d Cir.), cert. denied, 412 U.S.

928 (1973) (quoting United States v. Jorn, supra, 400 U.S. at 486), while remaining especially "[m]indful of the Supreme Court's admonition that any doubt should be resolved in favor of the liberty of the individual in order to prevent the exercise of 'an unlimited, uncertain, and arbitrary judicial discretion.'" Id. (quoting United States v. Downum, 372 U.S. 734, 738 (1963)) (emphasis supplied).

Thus, courts have long commanded that the government be held to a "heavy" burden of demonstrating a "high degree" of necessity. Arizona v. Washington, supra, 434 U.S. at 505-506. The basis of this command is apparent from the very words "manifest necessity." Thus, while "necessity" is itself a strong word, meaning "great or imperative need," WEBSTER'S NEW UNIVERSAL UNABRIDGED

DICTIONARY at 1200 (2d ed. 1979), courts have made it even stronger by modifying it with the term "manifest," which means "evident, clear, plain." Id. at 1094.

Although a judge is commanded to refrain from granting a mistrial unless he is "assured" through "scrupulous" factfinding that the government has met its "heavy" burden of establishing an evidently imperative need and that an "uncertain" or "arbitrary" decision is not being made, the Mastrangelo Court held that a mistrial could be granted if there was a "distinct possibility" of misconduct by the defendant. As Judge Meskill noted in his Mastrangelo dissent, these commands simply cannot be harmonized.

> The majority, in permitting the protections of the Fifth Amendment to be defeated by a reasonable conclusion that there is a "distinct possibility" that the

> defendant was somehow connected with the disappearance of government evidence, ignores the "heavy burden" and "high degree" standards enunciated in Arizona. The crux of the majority opinion is that it would be "impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events .... " It may well be impracticable to make such a determination, but I cannot accept the conclusion in this case that impracticability justifies relieving the government of its "heavy burden" to show that the denial of an important constitutional protection is highly necessary.

United States v. Mastrangelo, supra, 662 F.2d at 953-954 (Meskill, J., dissenting).

The plain language of the Mastrangelo standard demonstrates its incongruity and supports Judge Meskill's conclusion. Simply stated, "distinct" means "clear" or "plain", WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, supra, at 534, while "possible" means "capable of

existing". Id. at 1406. Thus, under the Mastrangelo standard, a defendant could have his constitutional protection against being twice put in jeopardy forfeited if a given circumstance is "clearly capable of existing", without any regard for whether it actually exists. Since almost anything is "clearly capable of existing," Mastrangelo is, in effect, standardless because it furnishes the trial court no meaningful guidance.

Unless this Court is prepared to devalue the "valued right" to be free from double jeopardy, Arizona v. Washington, supra, 434 U.S. at 503, the Mastrangelo standard cannot become the norm. The Mastrangelo standard allows a defendant to be reprosecuted -- and, thus, face all the attendant increased emotional and financial burdens, Arizona

v. Washington, supra, 434 U.S. at 503-504 -- "upon [a lesser] degree of proof than applies in a negligence case." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 n. 18 (1966).[16] This makes no sense in the context of a constitutional right deemed to be fundamental.

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[16] Indeed, even in certain civil cases, e.g., those alleging fraud, adultery, illegitimacy, lost wills or certain oral contracts, the higher standard of "clear and convincing evidence" has been applied. Woodby v. Immigration and Naturalization Service, supra, 385 U.S. at 285 n. 18.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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On The Petition

88-374

No.: _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LOPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1075-82, 1092-93
-- August Term, 1987

(Argued April 8, 1988
Decided April 26, 1988)

Docket Nos. 88-1083-88,
-1090-91, -1098, -1102

United States of America,
Appellee,

v.

Angelo Ruggiero, Gene Gotti, John Carneglia, Edward Lino, Mark Reiter, Joseph LoPresti, Anthony Moscatiello, Oscar Ansourian, Anthony Gurino, and Cesar Gurino,
Appellants.

Before LUMBARD, OAKES, and MINER, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, Judge, denying a motion to bar a retrial following the declaration

of a mistrial by Judge Mark A. Costantino of the United States District Court for the Eastern District of New York. Held, (1) retrial is not barred by Double Jeopardy Clause where mistrial was properly declared upon a showing of manifest necessity from evidence of jury tampering and from a finding that fewer than twelve impartial jurors remained; (2) where there is a distinct possibility of jury tampering, there is manifest necessity for a mistrial as to all defendants; and (3) evidentiary hearing on Government's intent in moving for mistrial is unnecessary where evidence disclosed after three days of hearings does not indicate misconduct.

Affirmed. Judge Lumbard dissents with a separate opinion.

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Goldstein, Tunick & Pollok, P.C., New York, NY, for Appellant Ruggiero; Ronald P. Fischetti, Fischetti & Pomerantz, New York, NY, for Appellant Gotti; Robert Katzberg, Kaplan & Katzberg, New York, NY, for Appellant Lino, of counsel), arguing for Appellants Ruggiero, Gotti, Carneglia and Lino.

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John Gleeson, Assistant United States Attorney (Andrew J. Maloney, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney, of counsel), for Appellee.

OAKES, Circuit Judge:

Ten defendants, following a declaration of mistrial, appeal from the denial of their motion to bar a retrial on double jeopardy grounds. The defendants -- Angelo Ruggiero, Gene Gotti, John Carneglia, Edward Lino, Mark Reiter, Joseph LoPresti, Anthony Moscatiello, Oscar Ansourian, Anthony Gurino, and Cesar Gurino -- were tried in the United States District Court for the Eastern District of New York, Mark A. Costantino, Judge, on charges of narcotics trafficking, obstruction of justice, racketeering, and operating a continuing criminal narcotics enterprise.[1] Judge Costantino declared a mistrial because he found that the defendants had attempted to identify and influence the jury and that the dismissal of three biased jurors left an

insufficient number of jurors to try the case. Assigned the case after mistrial, Judge Joseph M. McLaughlin relied heavily on Judge Costantino's opinion and concluded that the showing of a manifest necessity for the mistrial avoided a double jeopardy bar to a subsequent prosecution. We affirm.

BACKGROUND

A twelve-count superseding indictment charges Angelo Ruggiero, Gene Gotti, and John Carneglia with engaging in a continuing criminal narcotics enterprise in violation of 21 U.S.C. §848 (1982 & Supp. IV 1986). In addition, it charges all defendants with conspiracy to violate the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §1962(d) (1982), and with various other charges relating to narcotics trafficking and the obstruction of a grand jury

investigation. Trial commenced before Judge Costantino and an anonymous jury on June 1, 1987.

In October 1987, the United States Attorney learned that the Federal Bureau of Investigation (FBI) had received information from confidential sources that the defendants had identified members of the anonymous jury for the purpose of influencing the verdict. Specifically, the Government discovered that defendants John Carneglia, Gene Gotti, Angelo Ruggiero, and Edward Lino had employed William Sewell, a private investigator, to trace the license plates of suspected jurors. After Sewell had a falling out with these defendants, they used a different investigator, Victor Juliano. The confidential information indicated that the defendants had learned the identities of at least five of the

jurors and that one of the black jurors had been approached "and [was] now compromised." FBI investigators also learned that Juror No. 4, who was one of the few jurors who parked near the courthouse owned a car with a "vanity" license plate consisting of his first initial and full last name. After finding Juror No. 4's address in a Queens, New York, telephone book, the FBI investigators determined that he lived approximately five doors away from two men whom they suspected of engaging in organized criminal activities, often in association with the defendants.

This information prompted a grand jury investigation into the allegations of jury tampering. On December 8, 1987, while the grand jury investigation was proceeding, Gary Barnes, Juror No. 2, was excused from the jury because it was

discovered that he was not a United States citizen. Two days later, Barnes told FBI Special Agent John Flanagan that a co-worker, Mel Rosenberg, had telephoned him that morning and arranged to meet him.[2] According to Barnes, Rosenberg indicated he believed Barnes was a juror in the case, said he was a friend of defendant Gene Gotti, and offered Barnes a new BMW car in exchange for information about how the jury was "feeling."

On December 22 at 7:20 a.m., Agent Flanagan questioned Rosenberg at his home. Rosenberg admitted calling Barnes but said that it was a joke, a "lark." He denied that he ever mentioned the initials "G.G." or the name "Gene Gotti." He told the FBI agent that the only attorneys he knew were his brother-in-law and his own attorney, Brian Levinson. At

the end of this interview, Agent Flanagan served Rosenberg with a subpoena to appear before the grand jury the next day. Rosenberg said that he would be there.

According to tape recordings of telephone calls made from Rosenberg's office, two hours later he called a person named Anthony and said, "Yeah, listen, I don't have his number. I've got to speak to him." Anthony asked, "Who?" Rosenberg said, "You know." When Anthony asked what was the matter, Rosenberg said he could not talk about it on the telephone. Within the hour, he made a call to an unknown person identified as "Big A," again trying to contact "him." He told "Big A" that it was very important, that he was in trouble but that he could not talk about it on the phone. In a 3:30 p.m.

telephone conversation between Rosenberg and an unidentified male, Rosenberg indicated that he had to meet with an attorney. At 4:02 p.m., Rosenberg called attorney Brian Levinson and told the woman who answered that "Charlie Carnesi" would be calling on Rosenberg's behalf. At 4:26 p.m. Charles Carnesi called Rosenberg to tell him that he, Carnesi, had not "been able to get in touch with him yet." Three minutes later, Brian Levinson returned Rosenberg's call. Rosenberg said that "Charlie" was trying to get in touch with Levinson. He added that Carnesi would "lay out the groundwork" for Levinson for "this thing ... for tomorrow morning at 10 a.m.," the exact return date and time of Rosenberg's subpoena.

On January 7, 1988, the Government presented Judge Costantino with the

evidence of jury tampering and requested the court conduct an in camera voir dire of each juror. The Government also requested the court to hold an evidentiary hearing which would be closed to the public. Attached to the Government's memorandum in support of its motion were affidavits of FBI Special Agents John Flanagan and Martin A. Towey which described the information from confidential sources suggesting jury tampering as well as past reports that four of the principal defendants, Ruggiero, Gotti, Carneglia, and Ansourian, had tampered with judicial and law enforcement processes.

On Monday, January 11, 1988, Judge Costantino conducted seriatim a voir dire of the jurors as requested by the Government in chambers and without the presence of the lawyers. With the

exception of Juror No. 11, who stated that a person at work had indicated that he knew that she was on Angelo Ruggiero's jury, none of the jurors said that they had been approached. The next day, a transcript of the voir dire and the Government's papers were turned over to defense counsel. The Government renewed its request for closure and notified the court and the defendants that, based on inquiries that the United States Attorney's office had received, the press was already aware of the general nature of the proceedings. The defense joined the Government in its motion to close the hearing to the public. When the court declined to rule on the issue of closure, the Government moved to sequester the jury. The defendants opposed sequestration. That night, a television news story about the jury-tampering

allegations was aired. Nevertheless, on the morning of January 13, the court denied the Government's motion for closure. The Government immediately renewed its motion for sequestration of the jury. The court, "reserv[ing] decision on sequestration ... pending the hearing," commenced a hearing on the jury-tampering issue in open court.

The first witness was Gary Barnes, the juror who had been excused because he was not a United States citizen. Barnes testified that he had seen a man later identified as William Sewell sitting in the courtroom during the trial. He remembered seeing him once for three days in a row, and on another occasion speaking with Ronald Fischetti, Gene Gotti's attorney. Barnes testified that he once encountered Sewell in the municipal parking garage near the

courthouse. Barnes was talking with a fellow juror, about one hundred feet into the garage, when he noticed that Sewell had come up behind him, "literally side by side, like walking pretty fast." Barnes testified that when he recognized Sewell as the man he had seen in the courtroom, he asked Sewell who, like himself, was black, "what are you, chauffeur?" Sewell, who appeared offended by the question, replied, "No, I am a private investigator," and "kept going." Barnes and the other juror then went to the lower level of the parking garage where the other juror had parked her car. Sewell's car was parked up above.

Barnes also described his encounter with Mel Rosenberg. He testified that on December 10, his first day at work following his excusal from the jury, he received a telephone call from Rosenberg.

Although he and Rosenberg had worked in the same office at REFCO, Inc., a commodities brokerage firm, for four or five months in 1982, Barnes said they were not close friends. In fact, since January 1983 when Barnes became a commodities telephone clerk, the only contact between the two men had been casual exchanges in the hallway and one or two telephone calls when Rosenberg called to place an order. Consequently, Barnes considered Rosenberg's telephone call "unusual." He testified that Rosenberg asked him to come to his office that afternoon, the same afternoon Barnes had promised to meet an FBI agent. When Barnes arrived, Rosenberg interrupted the telephone call that he was making. Barnes asked Rosenberg what he wanted to talk about, but Rosenberg did not respond. He led Barnes to a small

conference room and closed the door. Barnes again asked him what he wanted to talk about. According to Barnes's testimony, Rosenberg said, "[T]here is a case in Queens. It has been going on for quite some time, right, and I know this kid. This kid is a very good friend of mine. I have known him for 42 years." Barnes said he told Rosenberg that he was not on jury duty in Queens but in Brooklyn. Rosenberg continued, "I know this kid for a long time and I just wanted to know how the jury is feeling." Barnes again repeated that he was in Brooklyn and did not know what Rosenberg was talking about. At that point in the conversation, Rosenberg said, "I am just going to give you initials, right, and this case is about drugs. ... Initial is G.G." Barnes reiterated that he was not on a jury in Queens. Rosenberg said,

"Okay, okay, Gene Gotti." Again Barnes said, "I don't know what you are talking about. I am not in Queens." Rosenberg said,

> I have known this kid for 42 years. I have known his family. We are good friends. I know his three daughters and everything. I just want to know what the jurors are thinking. I know this guy is probably going to get convicted, going to go to jail. ... [T]he Government is probably going to try to put this guy away for a long time because of his brother.

Rosenberg then mentioned a new BMW and asked him what kind of car he drove. Barnes said that he did not need a car and walked out of the room. Barnes testified that he had not seen Rosenberg during the trial, and that he had not told him he was on the Gene Gotti case or that he had been excused from jury duty. Nor did he ask how Rosenberg knew he was on the jury.

When the hearing continued the next day, January 14, FBI Special Agent Flanagan testified summarizing the information received from confidential sources and from his interviews with Barnes, Rosenberg, and Sewell. He reported that Rosenberg had claimed that he and Barnes were extremely close, as if they were father and son. The jury was sequestered that night. The next morning, FBI Special Agent Towey testified. Later that day Judge Costantino held a voir dire of the jury in open Court. Three jurors stated that they could no longer be impartial. Juror No. 4 was not sure whether his parents' fear would affect his judgment. Juror No. 8 admitted that he had learned that there were allegations of jury tampering and that family experiences prevented him from being impartial about the drug

charges which were more important to the case than he had originally thought. Juror No. 12 stated she was not sure that she could remain impartial because she had "put pieces together."[3]

On January 19, the first working day after the hearing had ended, the Government moved for a mistrial, urging Judge Costantino to make the following findings: that the proof presented during the trial, particularly of the narcotics charges, was overwhelming; that the Government had acted responsibly in commencing and conducting the jury-tampering proceedings; and that there was a manifest necessity for a mistrial because (1) an insufficient number of qualified jurors remained to continue with the case, (2) the evidence had established that the defendants had tampered with the jury, and (3) there

were no adequate alternative forms of relief that could ensure a fair trial. On January 21, the defendants filed a post-hearing memorandum, expressing their agreement that circumstances "necessitated [the] dismissal" of Jurors 4, 8, and 12.

Later that day the United States District Court for the Eastern District of New York convened en banc to consider whether the United States Attorney had made charges of jury tampering to create conditions necessitating a mistrial because he thought the evidence was favorable to the defendants.[4] The en banc court, after reviewing the jury-tampering proceedings before Judge Costantino and the grand jury proceedings, found that the grand jury proceedings were bona fide and appropriate and that there was good

reason for the United States Attorney to have brought the possibility of jury tampering to the trial judge's attention. The court observed that "[a]ny publicity arising from the United States Attorney's application, which may have come to the attention of some jurors and resulted in their doubting their ability to decide the case fairly was not due to the fault of the United States Attorney." The en banc court concluded that the question whether and when to order a mistrial was properly left to the trial judge.

On January 25, 1988, after reading the opinion of the en banc court to the parties, Judge Costantino declared a mistrial. Relying upon United States v. Mastrangelo, 662 F.2d 946, 952 (2d Cir. 1981), cert. denied, 456 U.S. 973 (1982), the judge found "that there is a very high degree of likelihood that the panel

sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants," creating a manifest necessity for a mistrial. Specifically, the court concluded that the testimony at the hearing corroborated the confidential information reported by the FBI agents. Crediting Barnes's testimony in its entirety, the court found that Mel Rosenberg's contact with him was "not done as a 'lark,' but in full earnestness." Noting that Rosenberg had said that he was a friend of Gene Gotti and that Gotti had three daughters, and that in arranging legal representation for his grand jury appearance, he had contacted Charles Carnesi, the attorney who had employed William Sewell and who had represented Sewell during his grand jury appearance, the court concluded that

Rosenberg "was acting on behalf of Gene Gotti when he contacted Gary Barnes."

Judge Costantino also noted that three jurors said that they could no longer be impartial. The court, believing their statements, had dismissed them for cause, which the court noted left it with "no alternative but to declare a mistrial." Neither the court, the Government, nor defense counsel looked into the possibility under Fed. R. Crim. P. 23(b) of continuing with eleven jurors.

Following the mistrial declaration, the case was reassigned to Judge Joseph M. McLaughlin, who severed the case into four parts. The Government then moved to revoke the pretrial release of Gene Gotti. Judge McLaughlin denied the motion because he found insufficient proof that Gotti actually hired Rosenberg

or authorized his action. The defendants then moved to bar a retrial on double jeopardy grounds, arguing that the evidence did not indicate that the defendants had tampered with the jury or that there was an insufficient number of impartial jurors. In contrast to their position before Judge Costantino, the defendants now argued that Jurors 4 and 12 could have been kept. Judge McLaughlin denied the motion on the basis that it was within Judge Costantino's discretion to apply the "distinct possibility" standard of proof endorsed in Mastrangelo to the jury-tampering facts, to assess the credibility of witnesses, and to excuse Jurors 4, 8, and 12 based on their statements on voir dire. He found that "[t]he media attention the proceedings attracted must be laid squarely at the feet of certain

defense counsel." In response to the claim by six defendants, Anthony Gurino, Cesar Gurino, Anthony Moscatiello, Oscar Ansourian, Joseph LoPresti, and Mark Reiter, that because they were not alleged to have participated in jury tampering, double jeopardy attached to prevent their retrial, he wrote "[t]here simply was no way to salvage this tainted jury for some of the defendants." Finally, he rejected the defendant's request for a hearing on the issue of the Government's intent in seeking a mistrial and an interview of the discharged jurors, noting that the record amply supported Judge Costantino's findings.

DISCUSSION

The Double Jeopardy Clause protects a defendant from governmental actions designed to provoke a mistrial "so as to afford the prosecution a more favorable

opportunity to convict the defendant." United States v. Dinitz, 424 U.S. 600, 611 (1976) (quoting Downum v. United States, 372 U.S. 734, 736 (1963)). Therefore, when the Government moves for a mistrial, it must show a high degree of necessity, a "manifest necessity," to avoid a double jeopardy bar to a subsequent prosecution. Arizona v. Washington, 434 U.S. 497, 505-06 (1978); Dunkerley v. Hogan, 579 F.2d 141, 145 (2d Cir. 1978), cert. denied, 439 U.S. 1090 (1979). "[T]he trial court's mistrial ruling is entitled to great deference irrespective of any statement of reasons by the trial court." Mastrangelo, 662 F.2d at 950. See also United States v. Grasso, 600 F.2d 342, 343 (2d Cir. 1979). We previously have rejected the appellants' argument that the Government must prove by a preponderance of the

evidence that defendants were responsible for the events triggering the mistrial, Mastrangelo, 662 F.2d at 951-52; the test is whether there is a "distinct possibility" that defendants were responsible for those events. Id. at 952. The rationale for adopting this test rather than a higher evidentiary standard applies whether the allegation is, as it was in Mastrangelo, the murder of a principal witness or, as here, threats and bribery; namely, to avoid a mini-trial which could last weeks or months and maximize the risk of alerting the jury to the allegations of misconduct. As we said in Mastrangelo, 662 F.2d at 952,

> [w]e must not only give due deference to the trial judge's determination, see Arizona v. Washington; United States v. Grasso, 600 F.2d at 347, but that determination in favor of the declaration of a mistrial in a

> case like this -- "along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny" -- "is entitled to special respect." Arizona v. Washington, 434 U.S. at 510.

Here, although all the jurors and the alternates denied in open court that anyone had approached them, the evidence did raise a "distinct possibility" that the defendants had identified several of the anonymous jurors and had tried to influence one or more of them. The affidavits of two FBI agents stated that Carneglia, Gotti, Lino, and Ruggiero employed private investigators Sewell and Juliano to identify jurors. In testimony credited by Judge Costantino, Barnes stated that he had been approached by Rosenberg, who apparently believed that Barnes was still on the jury, and that Sewell had followed him and another juror

into a garage where they had had a brief exchange. According to tape recordings of Rosenberg's telephone calls, Rosenberg, in preparation for his grand jury appearance, called Charles Carnesi, the attorney who had employed Sewell and who had represented Sewell during his grand jury appearance. These calls contradicted Rosenberg's claim to an FBI agent that he did not know any attorney other than Brian Levinson and his brother-in-law. Given the testimony presented at the hearing and the information the FBI received from confidential sources, the district court could find that there was a "distinct possibility" of jury tampering.

While the question is a closer one, we also believe that the court properly dismissed the three jurors, especially when we weigh their responses to the

court's questions in light of the evidence of jury tampering. The defendants themselves agreed at one point that Jurors 4, 8, and 12 should be excused. Juror No. 4 was not sure whether his parents' fears would affect his judgment; he owned a car with a readily identifiable license plate and lived near close associates of the defendants. Juror No. 8 admitted that he knew that there were allegations of jury tampering and that because of his family's experiences he could not be impartial about the drug charges. He added that he had learned only recently that these charges were a major part of the case. Because it seems implausible that after nine months of trial he had just learned about the drug charges, the trial court may have concluded that Juror No. 8 was concealing the true reason he

could no longer be impartial. Juror No. 12 stated that she was not sure that she could remain impartial because she had "put pieces together," which the trial judge could have interpreted as meaning that she had ascertained from the voir dire itself that there were allegations of jury tampering. Although these jurors claimed that no one had tried to influence them, and cited reasons other than jury tampering for their inability to be impartial, it is not likely under the circumstances of this case that a juror who had been approached would admit it in open court. Therefore, the trial court properly could have concluded that leaving these individuals on the jury was not a reasonable alternative.

Once the court had dismissed the three jurors, it properly could find that a mistrial was necessary from the number

of jurors remaining.[5] See United States v. Potash, 118 F.2d 54, 56 (2d Cir.), cert. denied, 313 U.S. 584 (1941). Although the Constitution does not require a twelve-member jury, Williams v. Florida, 399 U.S. 78, 103 (1970), and Fed. R. Crim. P. 23(b) was designed to provide an eleven-member jury in preference to a mistrial, United States v. Stratton, 779 F.2d 820, 831 (2d Cir. 1985), cert. denied, 476 U.S. 1162 (1986); see United States v. Gambino, 788 F.2d 938, 949 (3d Cir.), cert. denied, 107 S. Ct. 98 (1986), a jury may consist of fewer than twelve jurors only if the parties so stipulate and the court gives its approval or if a juror is excused for just cause after the jury has retired to consider its verdict. Fed. R. Crim. P. 23(b). As a court can grant a mistrial even where the defendant files a motion

to proceed with a jury of eleven, Parker v. United States, 507 F.2d 587, 589 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); Potash, 118 F.2d at 56, Judge Costantino did not abuse his discretion where defendants never offered such a stipulation, see Peters v. Quick, 567 F. Supp. 331, 333 (S.D.N.Y. 1983), aff'd mem., 732 F.2d 142 (2d Cir. 1984); cf. United States v. Hillard, 701 F.2d 1052, 1055 (2d Cir.) (defendant who did not seek continuance at trial cannot argue it was preferable to mistrial), cert. denied, 461 U.S. 958 (1983), and the Government never expressed a willingness to consent to an eleven-person jury. Moreover, there was a distinct possibility that, as the defendants had identified several of the remaining jurors, they had also attempted to influence them.

Appellants Moscatiello, Ansourian, LoPresti, Reiter, and Anthony and Cesar Gurino argue that they are entitled to the protections of the Double Jeopardy Clause because the Government never accused them of jury tampering. See United States v. Glover, 506 F.2d 291, 297 (2d Cir. 1974) (where defendant has done nothing to create problem, he is entitled to double jeopardy protection). We think Glover is totally distinguishable. The mistrial in that case was prompted by a Bruton problem concerning three of the four defendants, id. at 293-94, whereas the mistrial here benefited all the defendants, since a jury tainted as to some is tainted as to all.

Appellants argue that a hearing was required on the issue of the Government's intent in seeking a mistrial. After

three days of public hearings on jury tampering, the district court made sufficient findings of fact which can be reviewed on appeal. Compare United States v. Wilson, 534 F.2d 76, 82 (6th Cir. 1976) (findings limited to aborted trial). Judge Costantino properly found that appellants did not allege sufficient facts of improper prosecutorial conduct to warrant a hearing. See United States v. Rivera, 802 F.2d 593, 601 (2d Cir. 1986).

Judgment affirmed. Mandate to issue April 29, 1988.

1. The indictment in this case named an eleventh defendant, Joseph Guagliano. Guagliano's family reported him missing in February of 1986, according to an FBI affidavit.

2. Because Barnes and Rosenberg both worked at REFCO where all telephone calls are routinely recorded, the FBI was able to obtain a transcription of their December 10 conversation, part of which follows:

Rosenberg: What are you doing later?

Barnes: What am I doing later, who's this?

Rosenberg: Mel.

Barnes: Mel?

Rosenberg: Yeah.

Barnes: Mel from, ah ...

Rosenberg: Mel at REFCO.

Barnes: Yeah?

Rosenberg: Stop by later, I want to talk to you.

Barnes: What about?

Rosenberg: Doesn't matter! Stop by.

Barnes: No, you have to let me know. What time later?

Rosenberg: Whenever you got time.

Barnes: Whenever I have time.

Rosenberg: I'll be around. What time do you leave the floor, Gary, 2:30?

Barnes: Well, I'm leaving early today.

Rosenberg: Where you going?

Barnes: Uh?

Rosenberg: Where you going?

Barnes: Let me know what you want to talk to me about!

Rosenberg: No, no, no, not on the phone. I want to talk to you.

Barnes: You want ... I tell you what, can I call you back from the pay phone?

Rosenberg: I won't speak to you on the phone.

Barnes: Uh?

Rosenberg: I won't speak on the phone. This phone is taped here.

Barnes: I know, but I can call you back when the tape ...

Rosenberg: My phone is taped!

Barnes: Oh, you're taped, your phone is taped also?

Rosenberg: Yeah, I'm taped.

Barnes: Oh, can you go to another phone that's not taped?

Rosenberg: No! Try and come back here.

Barnes: Ah ... I'll try.

Rosenberg: What time do you leave? You're leaving what time?

Barnes: Oh, I could walk over there at least 2:30, quarter to three. What time are you leaving?

Rosenberg: I'll be here.

Barnes: Alright [sic].

Rosenberg: Ok?

Barnes: I'm kind of curious, what's the matter?

Rosenberg: No, I gotta talk to you.

Barnes: Yeah, alright [sic], no problem.

Rosenberg: Alright [sic].

(Call ends.)

3. A fuller interrogation of each is attached hereto as Appendix A.

4. 28 U.S.C. § 132(c) (1982) provides that federal judges shall sit singly "[e]xcept as otherwise provided by law, or rule or order of court." This section "expressly permits and sanctions the pre-Code practice followed in some districts where the district judges sat en banc to resolve questions of importance in the district." 7B J. Moore, Federal Practice 154.1 (1987). Thus,

although the judges in the United States District Court for the Eastern District of New York had never before sat en banc, the action was not unprecedented. See, e.g., Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa.), rev'd, 153 F.2d 212 (3d Cir. 1945), aff'd, 329 U.S. 495 (1947); In re Jay & Dee Store Co., 37 F.Supp. 989 (E.D. Pa. 1941); In re Clover Drugs, Inc., 21 F. Supp. 107 (E.D. Pa. 1937). More recently, the Eighth Circuit affirmed a decision of the United States District Court for the District of Nebraska sitting en banc concerning the appropriateness of disclosing evidence from secret grand jury proceedings. In re Disclosure of Testimony, 580 F.2d 281 (8th Cir. 1978).

5. In a case lasting as long as this one did, the court should perhaps have insisted on a greater number of alternate jurors than the four utilized here.

APPENDIX A

The court's questions to the jurors who indicated they could not be impartial and the jurors' responses follow:

[Juror No. 4]

THE COURT: Did you advise the Court someone in your family had seen some publicity and discussed that publicity?

JUROR NO. 4: Yes, my father. I think it was Wednesday. Before I could stop him, he blurted out what had been going on with the alleged jury tampering and Mr. Barnes' testimony.

. . . .

THE COURT: Because of that, your father discussing it with you and telling you about what he had heard or seen whatever it was on television or otherwise, did you then come in and ask Mr. Conway to have you come in, brought in before me?

JUROR NO. 4: Yes.

THE COURT: Did you come in before me?

JUROR NO. 4: Yes.

. . . .

THE COURT: Did you give the conversation as to what happened in your own home?

JUROR NO. 4: Yes.

THE COURT: With your father?

JUROR NO. 4: Yes.

THE COURT: And at this time did the Court ask you whether or not under the circumstances you could continue to serve as a juror?

JUROR NO. 4: Yes, you did at that time. I said I wasn't sure.

THE COURT: You were not sure, and you said you didn't know whether you could or not; is that right, sir?

JUROR NO. 4: Yes.

THE COURT: Do you still feel the same today?

JUROR NO. 4: Again, I have been thinking about it and I still at this point don't know whether I can be impartial.

THE COURT: You don't know whether you can be impartial. Thank you. Has anyone contacted you in the meantime -- I had forgotten to ask you that question, from the time I spoke to you on Wednesday or till today has anyone contacted you?

JUROR NO. 4: Since?

THE COURT: Since you spoke to me?

JUROR NO. 4: No.

THE COURT: Just another question. Anytime prior to Wednesday have you had any contact or discussed the jury matter with any jurors in this case?

JUROR NO. 4: No.

THE COURT: So they do not know what you told the Court, what you said out here at this point?

JUROR NO. 4: No.

. . . .

[Juror No. 8]

THE COURT: Today, as you sit here today, has anyone attempted to contact you, approach you or compromise you as far as you're sitting as a juror in this case?

JUROR NO. 8: No, they have not.

THE COURT: Has anyone discussed this matter with you, in the jury room or with you anywhere else in reference to the case you are sitting on or anything that may take place in relation thereto?

JUROR NO. 8: Only in just sort of a general undercurrent kind of way.

THE COURT: Is that general conversation that would that be taking place?

JUROR NO. 8: For example, at home on Monday I think at the end of the Matlock (phn) when the guy who does the 11:00 o'clock [sic] news, which is was at 9:00 o'clock [sic], said we are covering the following

stories. One, was I think it was something in substance to do with jury tampering and mob trial and since we get up at 4:30 -- I am asleep long before 11:00, so it left my wife rather concerned.

THE COURT: You have not heard any of the discussion that was had at the time that was on the television? Did you listen to any? Did you turn away from it?

JUROR NO. 8: No, becauses [sic] that was the 11:00 o'clock [sic] news and I go to sleep earlier.

THE COURT: You were asleep at the time?

JUROR NO. 8: Yes.

THE COURT: And you [sic] wife made the statement to you?

JUROR NO. 8: (Nodded head.)

THE COURT: When your wife made the statement to you, did you in some way, as gently as you could, tell her you were not to discuss any matter in reference to the

case in which you are sitting?

JUROR NO. 8: Yes. I said that I thought it was probably a case in New York. Mattie The Horse.

THE COURT: So you didn't discuss this matter at all?

JUROR NO. 8: No, sir.

. . . .

THE COURT: So as far as you are concerned, has your judgment in any way been impaired so you could not be fair and impartial sitting as juror in this case?

JUROR NO. 8: No, my judgment has not been impaired. The only thing that has changed is that you recall when you originally questioned us, when we were all prospective you emphasized the main issues in the case; conspiracy, harboring, racketeering, and to me those are abstract terms. You said that you would instruct us on those things.

THE COURT: Eventually.

JUROR NO. 8: To me those aren't straightforward things. They are not clear-cut issues.

THE COURT: Well, you have not received the law yet on that.

JUROR NO. 8: But it seemed when you were doing that back in April, Your Honor, that the fourth subject of indictment, drugs, seemed to be practically an afterthought.

As you were talking to us, you kept emphasizing the first three and it just seems to have gone along, that drugs seem to have to be more of a, perhaps, more of an issue.

THE COURT: I am not looking for your conclusion as to what you are concluding. What took place, as you recall, I told you, you can draw no conclusion until such time as you are asked to deliberate.

JUROR NO. 8: But the subject of

drugs comes up as an indictable offense.

In the drug issue, that is not one subject I will be objective on.

THE COURT: Are you telling the Court that you can not [sic] be fair and impartial?

JUROR NO. 8: Not on the subject of drugs based on immediate family experiences involving my children and so forth.

THE COURT: Okay.

JUROR NO. 8: That is my only problem.

THE COURT: I was not advised of this at any earlier time. This is the first time you are making this statement?-

JUROR NO. 8: Yes, because that is something that has changed.

. . . .

[Juror No. 12]

THE COURT: [I a]sked you some questions and the questions being,

whether or not anyone had approached you or attempted to compromise you in any way, contact you in relation to the issues in this case or any parties in this case? .... You said no one had?

JUROR NO. 12: Right.

THE COURT: Is your answer the same today?

[JUROR NO.12:] The only thing is that I kind of have an idea of -- on what this is all about and it is kind of changing my input as to whether I can be impartial or not.

THE COURT: I see. Would you say now because of the delay and your sitting in the jury room all this time you have come to some conclusions within yourself?

JUROR NO. 12: Yes.

. . . .

THE COURT: Those conclusions that you come to within yourself, do they have anything to do with any conversation that might

have taken place in the jury room?

JUROR NO. 12: No.

. . . .

THE COURT: So far as you are concerned you have not been in any way in discussion with any of the matters relating to this case, whether it be in the jury room or with anyone else?

JUROR NO. 12: No, not at all.

THE COURT: You also say whether or not something is taking place is affecting your judgment; is that what you are saying?

JUROR NO. 12: Might affect my judgment.

THE COURT: That it might affect your judgment, meaning it might affect you to a point where you might not be able to be fair and impartial?

JUROR NO. 12: Right.

THE COURT: So are you telling the Court that all that has taken place, that this would make it rather

difficult for you to come to a conclusion?

JUROR NO. 12: Yes, it would be.

THE COURT: Only because of the events, not because of the trial and evidence that has been submitted.

JUROR NO. 12: No, that is correct.

THE COURT: You are telling me also, that you wouldn't be able to serve any longer because you could not be impartial?

JUROR NO. 12: It would be difficult.

THE COURT: All right. You may step down.

United States v. Angelo Ruggiero, et al., 88-1083

LUMBARD, Circuit Judge (dissenting):

I dissent. I believe that the order of the district court should be reversed and the indictment dismissed as to these defendants. Retrial of these defendants subjects them to double jeopardy in violation of their rights under the fifth amendment of the Constitution.

A mistrial was declared on January 22, 1988, after more than eight months of a trial which began with the selection of the jurors in April 1987 and the presentation of evidence by the government commencing June 1. In light of the length of the government's case and the serious nature of the charges against these defendants, it was the paramount duty of the district court to

keep the trial going until the jury brought in a verdict. Without a determination by the court that the jurors were incapable of rendering a verdict based solely upon the evidence presented in the case, the trial should have continued until the jurors either reached a verdict or reported a hopeless failure to agree. The district court made no such determination.

The evidence presented to the court concerning the approach of dismissed juror Gary Barnes, and the attempts to identify the remaining jurors, certainly required the immediate attention of the court. Although the in camera ex parte examination of the remaining jurors (at which none of the counsel were present) by Judge Costantino disclosed that contact with the jury had occurred, it did however lead the court to believe

that some jurors were uneasy. Up to this time, the jurors had not been sequestered.

Judge Costantino next proceeded to conduct an examination of the jurors in open court with the defendants, counsel and the public present. In my view, the record shows no good reason for this decision. The open court examinations led the court to dismiss three jurors, numbers 4, 8 and 12, without any showing that as a result of any improper activity by the defendants, they could no longer render a verdict on the evidence in the case.

The testimony of those three jurors fell far short of providing a basis for disqualifying any of them. Juror number 4 told the court in camera that he was not sure that he could continue to serve because his father had mentioned to him

that there had been some allegations of jury tampering. Later, in open court, he said he still felt the same way and "did not know whether [he could] be impartial."

Juror number 8 disclosed that his wife had heard something on the radio about jury tampering and a mob trial. In answer to the court's question concerning whether in his judgment he had been impaired so that he could not be fair and impartial, he replied that "his judgment had not been impaired." However, he then volunteered that as the trial progressed, and the issue of drugs became central to the case, that he could not be fair and impartial because of immediate family members' involvement with drugs.

Juror number 12, who denied being contacted about the case, said that he had an idea "of what this is all about

and it is kind of changing my input as to whether I can be impartial or not." The questioning ended with him saying that "because of recent events and not because of the trial and evidence that has been submitted" he would find it difficult to be impartial. In my view, it does not appear from the record that any one of the three jurors could not have decided the case based on the evidence at trial. That is the ultimate test of the "manifest necessity" for a mistrial. Arizona v. Washington, 434 U.S. 497, 505-06 (1978). By the time they began their deliberations the jurors would have been reminded of their duty to decide the case based solely on the evidence presented many times during the proceedings -- first by the judge during jury selection, then by both counsel in the summations, and again by the judge in

his charge. Why were those three jurors not reminded of this duty before they were dismissed? Before taking the extraordinary step of declaring a mistrial, it was the duty of the court to urge the jurors to continue to serve and to consider the case solely on the evidence.

The examination of the jurors in open court in view of all that had taken place during the preceding three days could only have resulted in making them more uneasy about what was going on. Jury service in such a long trial is at best a strain and entails many personal sacrifices and is compensated largely by the fulfillment of an important civic duty. With few exceptions, those called for jury duty respond to the challenge. They accept the instructions of the judge. Countless times in our opinions,

we have reaffirmed our belief that jurors can be relied upon to follow the instructions of the court. Richardson v. Marsh, 107 S. Ct. 1702, 1707 (1987); United States v. Teitler, 802 F.2d 606, 617 (2d Cir. 1986). In addition, any conceivable prejudice that may have been caused by the jury hearing about the alleged jury tampering from the media could have been cured by a specific jury instruction. United States v. Feldman, 299 F.2d 914, 917 (2d Cir. 1962).

Here we have not a shred of evidence that any one of these three jurors could not have laid aside their apprehensions and rendered their verdict on the evidence. The judge never asked them to do that and never inquired about whether they could do so. On the contrary, in the setting in which the voir dire occurred, it surely must have seemed to

all three of these obviously uneasy jurors that they were being offered a way out of continuing the service which had become onerous and the continuance of which may have had unpredictable consequences.

Even assuming that dismissing the three jurors was proper, the record fails to show that the court took every reasonable step to continue the trial with a lesser number than 12. Indeed, before the court made its decision to dismiss the jury, it should have inquired of the defendants whether they would agree to be tried by a jury of less than 12. Neither the court nor the government inquired of the defendants or suggested such an inquiry. Although it is doubtful whether the defendants would have agreed, at the very least, the court should have made every attempt before deciding to

dismiss all three of the jurors. Keeping any one of the three jurors would have saved the jury and allowed the trial to continue.

The question was not whether any juror was still "impartial" -- whatever that ambiguous term might mean to the jurors. The question was whether there were enough jurors that could decide the case on the evidence. At the point a mistrial was declared, only the government's case had been presented to the jury. Thus, it seems more than likely that, at that point, before any defendants' evidence and before summations of counsel, many of the jurors would have formed some opinion. Even without rumors of jury tampering, they may have quite naturally no longer been "impartial."

There was no showing that any remaining member of the jury had been tainted or even approached. There was no showing that as a result of the inquiry by the court that any member of the jury could not have rendered a verdict on the evidence in the case. This, combined with the judge's remarks about his displeasure regarding the trial, the mishandling of the voir dire, and his failure to take reasonable measures to retain a jury which could have reached a verdict, leads me to conclude that there was no showing of "manifest necessity" to justify the declaration of a mistrial.

However heinous the crimes of which the defendants stand accused, and however despicable their reputations, they are no less entitled to the protection of the Constitution afforded by the prohibition against double jeopardy.

I would reverse the order of the district court and dismiss the indictment as to these defendants.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st. day of June one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,

Appellee

v. Docket No. 88-1083

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LoPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LoPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO, and CESAR GURINO.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Lumbard dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA, CR 83-412(S)

-against- MEMORANDUM OF DECISION AND

ANGELO RUGGIERO, et al., ORDER
Defendants.

----------X

COSTANTINO, D. J.

Trial of this case, which involves charges of Racketeering, Distribution of Heroin, Obstruction of Justice and Conspiracy to Obstruct Justice, commenced in April 1987, when an anonymous jury was empaneled. Opening statements began on June 1, 1987. On October 22, 1987, the Government began an investigation, necessitated by information obtained from confidential sources, to discover whether the jury sitting in this case had been compromised. On January 8, 1988, the Government brought the fruits of its investigation to the court's attention

investigation to the court's attention and requested that the Court conduct an in camera voir dire of each juror and a hearing to determine if unlawful contact with the jurors had, in fact, occurred.

Confronted with the seriousness and the immediacy of the information presented by the Government, the Court granted the Government's request and interviewed each juror in chambers without first notifying the defendants. The next day, defense counsel was presented with a transcript of the voir dire and the Government's motion papers. Over the following three days, the Court conducted hearings in order to determine the merits of the Government's allegations. At the conclusion of the hearings, the Government moved for a mistrial and on January 22, the Court granted the motion. The following

constitutes this Court's findings with respect to the Government's motion.

At the outset, it is important to note that the defendants' assertion that the Government bears the burden of establishing by a preponderance of the evidence that jury tampering has occurred is incorrect. In a case similar to the one at bar, where the trial court "understandably believed" that the defendant was responsible for the death of a crucial Government witness, the Court of Appeals for the Second Circuit stated:

> "the test [is] simply whether at the time the trial judge is faced with the question he reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at least where ... the Government is totally without fault and the case cannot proceed and the ends of justice be served..."

United States v. Mastrangelo, 662 F.2d 946, 952 (2d. Cir. 1981).

Although the Government also urges this Court to make its findings based on the more rigorous preponderance standard, the Court will not accept the invitation. In light of the exigency of determining whether to proceed with the trial and the obvious constraints placed upon the Court's ability to fully explore the Government's allegations at a short hearing, the Court can perceive no reason to depart from the standard enunciated in Mastrangelo. The fact that the Government had more time to investigate the defendants' misconduct than it did in Mastrangelo is of limited significance, for it is the Court that must make the expeditious determination of whether the trial may go forward in the face of the Government's assertion (and the

defendants' vehement denials) that jury tampering has occurred. Id. at 951-952.

The defendants are also incorrect in their assertion that "the jurors' answers to the Court's voir dires are conclusive and absolutely preclude a finding by the Court that jury tampering has occurred." (Defendants' Joint Memorandum, p. 23). Irvin v. Dowd, 366 U.S. 717, 725 (1960); Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980). If the Court believed that the voir dire resolved the Government's allegations, the inquiry would have ended there. The voir dire did not solve the issue to the court's satisfaction, however, and the additional proceedings were clearly warranted.

Both the Government and the defendants have set forth extensive reviews in their submissions of the evidence that was adduced at the trial,

presumably so that the Court could determine whether the defendants had a motive to tamper with the jury. The defendants also present their interpretation of the trial evidence to bolster their claim that the Government acted in bad faith in bringing its mistrial motion. This latter point is clearly a question for future proceeding (however, the Court fully adopts the January 21, 1988 opinion of the en banc panel on this issue).

In regard to whether the evidence introduced at trial provided the defendants with a motive to tamper with the jury, the Court will not pass on the weight of the trial evidence. A judicial endorsement of the Government's case could significantly prejudice the defendants at subsequent trial. The Court does find, however, that the

charges and the possible sentences faced by the defendants if they were convicted provided the defendants with ample motive to tamper with the jury.

Based upon the evidence adduced at the hearing and the materials submitted by the Government, the Court finds that there is a very high degree of likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants.

In an affidavit dated January 7, 1988, Special Agent Martin J. Towey states that he has been advised by Special Agent Robert J. Liberatore that the Federal Bureau of Investigation ("F.B.I.") has received information from confidential sources regarding jury

tampering in this case. Specifically, Agent Towey advises that:

[3] a. Beginning in the summer of 1987, the defendants in this case began to take overt measures to identify members of the anonymous jury in order to fix the case. Specifically, the plot was engineered by John Carneglia, Gene Gotti, Angelo Ruggiero and Eddie Lino.

b. The defendants have learned the identities of at least five of the jurors.

c. Initially, the defendants used the services of William Sewell, an investigator, to help identify members of the jury. Sewell's services included having computer searches conducted to trace the license plates of cars in which the jurors were observed.

d. At least one of the black jurors has been approached and is now

> compromised. (footnote omitted).

Towey Aff, pp. 2-3.

Although standing alone this hearsay information might be considered too attenuated for the Court to make a finding of jury tampering, testimony adduced at the hearing provides potent corroboration of Towey's statements. For example, former juror number two, Gary Barnes, served on the panel until December 8, 1987. He was discharged on that date after it was learned that he was not a United States citizen and was therefore not qualified to serve as a juror. (28 U.S.C. §1865 (b)(1)). Mr. Barnes was the Government's first witness at the hearing. The Court finds Barnes to be a completely trustworthy witness, and it credits his testimony in its entirety. At the hearing, Barnes

testified that he is employed at REFCO, Inc. as a commodities telephone clerk. (Tr. 10210/1.). Barnes identified a photograph, marked as Government exhibit 4, as a person he observed in courtroom on several occasions. (Tr. 10224). Exhibit 4 is photograph of William Sewell, the private investigator named in the Towey affidavit and in the affidavit of Special Agent John Flanagan. Barnes observed Sewell on one occasion in the municipal parking lot used by several of the jurors. (Tr. 10227). At that time, they had a brief verbal interchange which was initiated by Barnes. Although the defendants have painted this conversation as "utterly innocuous" (Defendants' Joint Memorandum, p. 32), the Court does not agree with this characterization. The import of Barnes's testimony and the significance of his question -- "Are you

a chauffeur?" -- is that Barnes was curious about why Sewell had followed him into the garage.

The defendants also make much of the fact that Sewell truthfully told Barnes that he was a private investigator in response to Barnes's question/2. It would bespeak ill of Sewell's skills as an experienced investigator and former New York City detective, however, if he responded untruthfully with an answer that could be so easily verified that it might unveil the defendants' stratagem in an instant.

The information obtained from the confidential source is also substantiated by the events which transpired shortly after Mr. Barnes was discharged from the jury on December 8. On December 9, Special Agent Flanagan telephoned Barnes and arranged an interview for the

afternoon of the next day. (Tr. 10235). On December 10, at 10:45 A.M., prior to his meeting with Flanagan, Barnes received a telephone call from Melvin Rosenberg. Rosenberg is also employed by REFCO. That conversation was recorded at REFCO in the regular course of business and was replayed during the hearing/3. It is patent from this conversation that: (1) Barnes did not recognize the speaker until Rosenberg identified himself several times, (2) Rosenberg was very serious about his need to meet with Barnes, and (3) Rosenberg believed that the subject matter of his planned meeting with Barnes could not be stated on a taped telephone. This latter point is especially noteworthy, for it evinces that Rosenberg knew that his contact with Barnes was prohibited. It also undermines the defendants' suggestion

that Rosenberg thought Barnes was no longer a sitting juror when he contacted him.

Rosenberg's subsequent meeting with Barnes further substantiates the confidential sources' information. Specifically, Barnes related that Rosenberg said that he knew Barnes was on a jury, that he (Rosenberg) was friends with one of the defendants in that trial, and that the defendant he was friends with was Gene Gotti. Rosenberg also told Barnes that he had been a friend of the Gotti family for over forty years and that he knew Gotti's three daughters. Rosenberg then pressed Barnes for information about what the jury's inclinations were and suggested that a new B.M.W. automobile would be Barnes's remuneration if Barnes would divulge the information. Barnes steadfastly refused

to acknowledge Rosenberg's statements and when the bribe was tendered, Barnes told Rosenberg that he didn't know what he was talking about and left the room. (Tr. 10).

On December 22, 1987, Rosenberg was interviewed by Agent Flanagan. Rosenberg stated that his approach of Barnes was a "lark," that his acquaintance with Barnes was akin to a father/son relationship, and that he did not know Gene Gotti personally but that he knew Gotti's name from the newspapers.

Several conclusions may be gleaned from Rosenberg's contact with Barnes and his subsequent statements to Agent Flanagan. First, it is apparent that his contact with Barnes was not done as a "lark," but in full earnestness. That fact is clear from the initial telephone conversation and to Barnes's testimony.

(Tr. 10246). Second, Rosenberg lied to Agent Flanagan when he stated that he and Barnes had a father/son relationship. This statement is contradicted by the very credible testimony of Mr. Barnes who stated that Rosenberg was only someone he would acknowledge in the hall from time to time. (Tr. 10241-2). Rosenberg also lied to Agent Flanagan when he stated that he only knew Gene Gotti's name from the newspaper. It is inconceivable that Rosenberg would tell Barnes that he was a friend of the Gotti family for over forty years, that he knew Gene Gotti and his three daughters,/4 that he would engage in conduct that he apparently recognized as unlawful and offer Barnes a substantial reward had he not had more than an offhand knowledge of Gene Gotti. It is evident to the Court, based on Rosenberg's statements and actions, that

he was acting on behalf of Gene Gotti when he contacted Gary Barnes.

There is additional circumstantial evidence that ties Rosenberg to Gotti. At the conclusion of his interview with Rosenberg Agent Flanagan served Rosenberg with a grand jury subpoena. In arranging legal representation for his upcoming grand jury appearance, Rosenberg contacted Charles Carnesi, Esq., the attorney who employed William Sewell and who represented Sewell during his grand jury appearance. (Tr. 10). The Court finds that in the face of all the facts that have come to light during the hearing, it is highly unlikely that Rosenberg's connection to Carnesi and Sewell and thus, to Gene Gotti is mere happenstance.

Based on the foregoing, the Court finds that there is a manifest necessity

to declare a mistrial in this case due to the defendants' efforts to improperly identify and influence the jury. See e.g. Arizona v. Washington, 434 U.S. 497 (1978); United States v. Mastrangelo, 662 F.2d at 951 n.2.

The Court also finds that there is a manifest necessity for the declaration of a mistrial because there is an insufficient number of jurors who can deliberate fairly and impartially.

During the voir dire of the jury, three jurors - numbers four, eight and twelve stated that they could no longer remain fair and impartial. (Tr. 10445, 10452-3, 10462-3, 10464-6). The Court believed these jurors' statements, and they were therefore dismissed for cause. See Irwin v. Dowd, 366 U.S. 717 (1960); United States v. Giante, 729 F.2d 78 (2d Cir.), cert. denied, 104 S.Ct. 2390

(1982). At the time jurors four, eight and twelve were dismissed, two alternate jurors remained on the panel. There was, therefore, an insufficient number of jurors with which to proceed, and the Court had no alternative but to declare a mistrial.

The parties are directed to appear before Chief Judge Weinstein on January 27, 1988 at 9:30 A.M.

SO ORDERED.

Dated: Brooklyn, New York
January 25, 1988

/s/_____
U. S. D. J.

FOOTNOTES

/1 Citations marked "TR" to the hearing transcript.

/2 A transcript of this conversation was introduced at the hearing as Government Exhibit 2A. It provides:

Ben Lopez: REFCO Sugar

MR: Benny?

Ben: Yes?

MR: Is GARY around?

Ben: GARY BARNES?

MR: Yeah.

Ben: Yeah sure, one sec.

MR: Mr. BARNES?

GB: Yeah, yes sir.

MR: I like the way you say that.

GB(?): (Laugh)

MR: What are you doing later?

GB: What am I doing later, who's this?

MR: MEL.

GB: MEL?

MR: Yeah.

GB: MEL from, ah...

MR: MEL at REFCO.

GB: Yeah?

MR: Stop by later, I want to talk to you.

GB: What about?

MR: Doesn't matter! Stop by.

GB: No, you have to let me know. What time later?

MR: Whenever you got time.

GB: Whenever I have time.

MR: I'll be around. What time do you leave the floor, GARY, 2:30?

GB: Well, I'm leaving early today.

MR: Where you going?

GB: Uh?

MR: Where you going?

GB: Let me know what you want to talk to me about!

MR: No, no, no, not on the phone. I want to talk to you.

GB: You want ... I tell you what, can I call you back from the pay phone?

MR: I won't speak to you on the phone.

GB: Uh?

MR: I won't speak on the phone. This phone is taped here.

GB: I know, but I can call you back when the tape...

MR: My phone is taped!

GB: Oh, you're taped, you phone is taped also?

MR: Yeah, I'm taped.

GB: Oh, can you go to another phone that's not taped?

MR: No! Try and come back here.

GB: Ah ... I'll try.

MR: What time do you leave? You're leaving what time?

GB: Oh, I could walk over there at least 2:30, quarter to three. What time are you leaving?

MR: I'll be here.

GB: Alright.

MR: Ok?

GB: I'm kind of curious, what's the matter?

MR: No, I gotta talk to you.

GB: Yeah, alright, no problem.

MR: Alright

(Call ends)

/3 Indeed, it is unlikely that Rosenberg would know that Gotti had three daughters if he only knew Gotti's name from the newspapers.

/4 The defendants also place much reliance on Sewell's statements to the grand jury that he was not retained by the defendants in this case and that he has not taken steps to identify jurors in this case. It would not be surprising if Sewell was less than candid in these statements, however, given his acknowledged closeness to the Gotti family and Angelo Ruggiero.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

MEMORANDUM AND ORDER

ANGELO RUGGIERO
GENE GOTTI
JOSEPH CARNEGLIA
MICHAEL COIRO
ANTHONY MOSCATIELLO
OSCAR ANSOURIAN
EDWARD LINO
MARK REITER
JOSEPH LO PRESTI
CAESAR GURINO and
ANTHONY GURINO

83 CR 412 (S)

Defendants.

----------X

McLAUGHLIN, District Judge

Defendants move on double jeopardy grounds for an order barring their retrial. In the alternative, they seek an evidentiary hearing to establish the government's basis and intent in moving for a mistrial, which was granted by Judge Mark Costantino on January 22,

1988. The government has moved for an order (1) changing the situs of the trial from this District's Brooklyn courthouse to its Uniondale courthouse and (2) empaneling an anonymous jury. For the reasons discussed below, the defendants' double jeopardy motions are denied; the government's motion to change the situs of the trial is denied; and the government's motion for empanelment of an anonymous jury is granted.

FACTS

I. THE FIRST TRIAL: JURY TAMPERING

Selection of an anonymous jury in this prosecution began in April 1987. A lengthy trial began on June 1, 1987. In October 1987, the United States Attorney, Andrew J. Maloney, learned that the Federal Bureau of Investigation ("F.B.I.") had received information from reliable confidential sources that the defendants had identified members of the anonymous jury for the purpose of unlawfully influencing their verdict. See Affidavit of Andrew J. Maloney, January 21, 1988, ¶ 7, at 3.

According to the confidential sources, the defendants took overt steps to identify members of the jury during the summer of 1987. The scheme allegedly was engineered by the defendants John Carneglia, Gene Gotti, Edward Lino and

Angelo Ruggiero. Methods used to identify the jurors included the use of an investigator named William Sewell, who traced the license plate numbers of cars in which the jurors were observed. At some later point, defendants employed another investigator, Victor Juliano. See Affidavit of Special Agent Martin J. Towey, January 7, 1988, ¶3, at 2-3.

As a result of this information, a grand jury investigation was commenced on October 22, 1987 with the issuance of a subpoena for the names and addresses of the jurors. The subpoena was signed by Chief Judge Jack Weinstein, rather than Judge Costantino, to avoid the risk of unnecessarily prejudicing Judge Costantino during the course of the trial. See Maloney Affidavit, supra, ¶ 8, at 3-4. The grand jury investigation continues to this date.

On December 8, 1987, Juror Number Two, Gary Barnes, was dismissed for reasons unrelated to these proceedings (he was not a United States citizen). The government interviewed Barnes on December 10, 1987 in connection with its jury tampering probe. Barnes told the F.B.I. that earlier that very day, he was approached by one Mel Rosenberg, a co-employee of Barnes, who believed that Barnes was still on the jury. On behalf of Rosenberg's "friend," defendant Gotti, Rosenberg offered Barnes a new BMW automobile in exchange for information about how the jury was feeling or thinking about the case. See Maloney Affidavit, supra, ¶ 10 at 4; United States v. Ruggiero, 83 Cr 412(S)(MAC) at 5-8 (Jan. 25, 1988).

Shortly thereafter, the United States Attorney summoned Supervisory Special

Agents of the F.B.I. to a meeting where he learned additional confidential information that had not been disclosed to the grand jury. This new information included certain corroboration of the specific information obtained through confidential sources and evidence that at least one juror had actually been approached and compromised. The United States Attorney characterized this additional confidential information as "extensive and convincing." Maloney Affidavit, supra, ¶ 11, at 4-5.

Based on all the information in its possession -- and particularly the corroborated information that led the United States Attorney to conclude that jury tampering had in fact occurred -- the government brought the facts to the attention of Judge Costantino.

II. GOVERNMENT'S MOTION FOR A VOIR DIRE OF THE JURY

On January 8, 1988, the government made a motion, ex parte, to Judge Costantino requesting an individual in camera voir dire of each juror, on the record but in the absence of counsel for either side. The government based its request on an affidavit of F.B.I. Special Agent John Flanagan, dated January 7, 1988, the Towey Affidavit, supra, and a memorandum of law dated January 7, 1988. The government urged Judge Costantino to carefully limit his voir dire to avoid creating prejudice in the minds of the jurors. See Government Memorandum of Law in Support of its Motion for a Voir Dire and for Further Relief Resulting from Jury Tampering by the Defendants, January 7, 1988, at 17-19. The government also requested that, if the voir dire itself

did not confirm that tampering had occurred, then an evidentiary hearing should be held and the hearing should be closed to protect the jury from prejudicial publicity.

On January 11, 1988, Judge Costantino granted the first part of the government's motion, without notice to the defendants, and he conducted a meticulous in camera voir dire of each juror. As requested, the voir dire was conducted on the record, in the absence of counsel. Each juror denied that he had been approached.

The following morning, the transcript of the voir dire and the government's motion papers were provided to defense counsel. The government reminded Judge Costantino of its alternative motion to close the proceedings. Because Judge Costantino had not yet decided that

motion, and because defense counsel had not reviewed the government's papers, the proceedings were adjourned to the afternoon. The government renewed its motion for closure when the afternoon session resumed, and defense counsel joined in that request. Judge Costantino still had not concluded that closure was warranted, and as a result, the government moved to sequester the jury. The defendants opposed sequestration and Judge Costantino reserved decision. The proceeding, however, already had piqued the curiosity of the press. The government again renewed its motion for closure and sequestration. The defendants again opposed sequestration. That evening there indeed was publicity regarding the jury tampering issue. While watching television at least one juror, Number Eight, viewed a news

headline relating to the day's proceedings.

The next morning, January 13, 1988, Judge Costantino denied the parties' request for closure. The government renewed its request to sequester the jury. Judge Costantino then commenced a public hearing, upon the government's motion, and over defendants' objection, on the issue of defendants' efforts to tamper with the jury.

III. THE JURY TAMPERING HEARING

A. Former Juror Number Two, Gary Barnes

The government's first witness was Gary Barnes, former Juror Number Two. Barnes testified that he is employed at REFCO, Inc. as a commodities telephone clerk. Barnes identified a photograph of William Sewell as a person he had seen in the courtroom on several occasions, and

in the parking lot used by several jurors. Curious about why Sewell followed him to the parking lot, Barnes testified that he asked Sewell whether he was a chauffeur. Sewell responded that he was a private investigator. Barnes also testified about his contact with Mel Rosenberg, a co-employee at REFCO. Barnes had received a telephone call on December 10, 1987 from Rosenberg at work. The call was automatically recorded because REFCO records all employee calls. The recording was obtained by the government and played at the hearing. Judge Costantino found that it was "patent from the conversation that: (1) Barnes did not recognize the speaker until Rosenberg identified himself several times; (2) Rosenberg was very serious about his need to meet with Barnes; and (3) Rosenberg believed that

the subject matter of [a] planned meeting could not be stated on a taped telephone ... evinc[ing] Rosenberg['s] [knowledge] that his contact with Barnes was prohibited [and] undermine[d] the defendants' suggestion that Rosenberg thought Barnes was no longer a sitting juror when he contacted him." United States v. Ruggiero, supra, at 7.

At a subsequent meeting with Barnes, Rosenberg said he knew that Barnes was on the jury. Barnes testified, however, that he never told anyone at work or any other place what case he was on. Rosenberg told Barnes that he had been a friend of defendant Gotti for over forty years and knew Gotti's three daughters. Rosenberg then pressed Barnes for information about the jury's inclinations, stating that a new BMW automobile would be Barnes' reward if

Barnes would divulge the information. Barnes testified that he told Rosenberg that he did not know what Rosenberg was talking about and left the room.

After the hearing on January 13, 1988, counsel for Gotti gave a television interview. He stated that the government had commenced the jury tampering proceedings in desperation because the government believed its case was lost. The government now argues that this statement was directed to the unsequestered jury in an effort to interfere with the government's right to a fair trial.

B. Agent Flanagan

F.B.I. Special Agent Flanagan testified about an interview he conducted with Mel Rosenberg on December 22, 1987. Rosenberg stated that his approach of Barnes was a "lark," and his acquaintance

with Barnes was akin to a father/son relationship, and that he did not know Gotti personally, but had only read about him in the newspapers.

Agent Flanagan also testified about serving a grand jury subpoena on William Sewell on November 10, 1987. During the grand jury proceedings Sewell was represented by attorney, Charles Carnesi. Over defense objections, Flanagan read portions of Sewell's grand jury testimony. Sewell testified that in the time since he had received the subpoena, he and Carnesi met with defendant Ruggiero at the Metropolitan Correctional Center. Although the subpoena was discussed at this meeting, Sewell claimed that he could not remember what was said.

Agent Flanagan testified further about Mel Rosenberg. Flanagan served Rosenberg on December 22, 1987 at

approximately 7:30 a.m. with a subpoena to testify before the grand jury the following day. At that time, Rosenberg claimed that the only two lawyers he knew were his brother-in-law and one Brian Levinson. At 9:22 a.m., after Rosenberg went to work, tape recorded conversations revealed that he called a person named Anthony in an attempt to find an unidentified person ("him"). When Anthony attempted to inquire further about the problem, Rosenberg stated that he did not want to discuss it on the telephone. Another unsuccessful attempt to reach "him" about a matter "very important" was made at 10:14 a.m. From 12:00 to 3:00 p.m. on December 22, 1987, Rosenberg made no phone calls. At 3:30 p.m. Rosenberg stated on the telephone that he had been in a three-hour meeting with a lawyer. Later telephone

conversations recorded that day revealed that Rosenberg's meeting was with Charles Carnesi, who would "lay the groundwork" for the "thing" "tomorrow morning at 10:00 a.m." with Rosenberg's lawyer Brian Levinson. The "thing" was Rosenberg's grand jury appearance, where Rosenberg invoked his Fifth Amendment privilege.

C. Agent Towey

The government called Special Agent Martin Towey as its final witness on January 14, 1988. Towey testified to the contents of his January 7, 1988 affidavit regarding information obtained from confidential sources. Agent Towey further stated that his affidavit was based on information provided to him by Special Agent Robert J. Liberatore and that he was told the information was true. Agent Liberatore was not called a witness.

The jury was sequestered for the first time on the night of January 14, 1988.

IV. THE SECOND VOIR DIRE OF THE JURY

Judge Costantino conducted a second voir dire of the jury in open court on January 15, 1988. The voir dire revealed that three jurors could not fairly weigh the evidence in the case. Juror Number Eight stated that he had lost his impartiality as a result of the substantial trial evidence presented about defendants' narcotics activities. Because of the juror's personal experience with members of his family and drugs, he felt that he could no longer be fair and impartial.

Juror Number Four was uncertain whether he could remain impartial because members of his family had expressed concern that the defendants knew his

identity. Juror Number Four stated that he was concerned that his family might be in danger. Other remarks he made indicated that he had been made aware of Gary Barnes' testimony at the jury tampering hearing. Juror Number Twelve stated that she could no longer be impartial because she had "put pieces together." The second voir dire thus disclosed that only nine jurors remained impartial, at least nominally.

IV. POST HEARING PROCEEDINGS

On January 19, 1988, the government submitted a post-hearing memorandum wherein it urged Judge Costantino to make the following findings: (1) that the proof presented at trial, particularly on the narcotics charges, was overwhelming;/1 (2) that the government acted responsibly in the way it commenced and conducted the jury tampering

proceedings; (3) that there was a manifest necessity for a mistrial because there was an insufficient number of qualified jurors to continue with the case; (4) that there was a manifest necessity for a mistrial because the evidence established that the defendants had tampered with the jury; and (5) that a mistrial was necessary because there was no adequate alternative form of relief that could ensure a fair trial for the government.

A. The En Banc Proceedings

On January 21, 1988, a special en banc panel of the Judges of the Eastern District convened. On this same day defendants' submitted their post-hearing memorandum. The en banc panel was provided with transcripts of grand jury proceedings conducted from October 22, 1987 to January 21, 1988, and all of the

F.B.I. agents' reports (other than handwritten notes of confidential source information) relating to the jury tampering investigation. After oral argument and deliberation, the panel found that (1) the grand jury proceeding investigating possible jury tampering was appropriate and bona fide; (2) there was good reason for the government to have brought the possibility of jury tampering to Judge Costantino's attention; (3) any publicity arising from the application of the United States Attorney that came to the attention of the jurors was not due to the fault of the United States Attorney; and (4) it was for Judge Costantino to determine whether a mistrial should be granted.

B. Judge Costantino's Findings

By order dated January 22, 1988 Judge Costantino declared a mistrial. In a

memorandum dated January 25, 1988, Judge Costantino found "that there is a very high degree of likelihood that the [jury] panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants." Specifically, Judge Costantino credited the testimony of Gary Barnes in its entirety. Judge Costantino also found that William Sewell had been in the courtroom on several occasions and had followed Barnes to a municipal parking lot where several jurors had parked their cars. Judge Costantino found that Mel Rosenberg clearly knew that contacting Barnes was prohibited; that Rosenberg's actions were not a "lark;" that his friendship with Barnes was not as close as Rosenberg had claimed; that it was "evident" that Rosenberg was acting on

behalf of Gene Gotti; and that it was "highly unlikely that Rosenberg's connection to Carnesi and Sewell and thus, to Gene Gotti is mere happenstance."

As a second basis for the mistrial order, Judge Costantino noted that Jurors Four, Eight and Twelve could no longer be impartial. The dismissal of these jurors, which the defendants' did not oppose, see Defendants' Joint Memorandum in Response to Government's Request for Factual Findings and the Declaration of a Mistrial for Manifest Necessity, January 21, 1988, at 34, 41, left an insufficient number of impartial jurors. Judge Costantino thus had "no alternative but to declare a mistrial.

DISCUSSION

I. DOUBLE JEOPARDY

The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Once jeopardy attaches, a defendant possesses a "valued right to have his trial completed by a particular tribunal." Wade v. Hunger, 336 U.S. 684, 689 (1948). This right, however, must be balanced against "the public interest in insuring that the prosecutor be accorded one full opportunity to present his case against the accused and that both sides receive a fundamentally fair trial." Dunkerley v. Hogan, 579 F.2d 141, 145 (2d Cir. 1978), cert. denied, 439 U.S. 1090 (1979) (emphasis added).

In the mine-run of cases it is the defendant who moves for a mistrial and

the double jeopardy problem is a minor consequence. When it is the government that seeks a mistrial, however, double jeopardy looms large. Arizona v. Washington, 434 U.S. 497 (1978), teaches that in order to avoid the double jeopardy bar the government must establish a "manifest necessity" for any mistrial declared over a defendant's objection. Id. at 505-06. There must exist a "high degree" of necessity before the prosecution's motion for mistrial is granted. Id. at 507. It is against this background of well-settled law that defendants' claims must be examined.

A. The Mistrial

As discussed above, Judge Costantino's decision to declare a mistrial was founded on two grounds: evidence that the defendants had tampered with the jury and an insufficient number

of impartial jurors. Defendants argue strenuously that both conclusions were clearly erroneous and, thus, a mistrial was improperly declared.

1. Jury Tampering

Defendants first take issue with the standard of proof Judge Costantino used to determine whether jury tampering occurred. In their post-hearing memorandum to Judge Costantino, defendants urged the court to employ a preponderance of evidence standard. The government also asked for the application of a preponderance standard, but suggested that there was considerable support for using the lesser standard enunciated in United States v. Mastrangelo, 662 F.2d 946, 952 (2d Cir. 1981), cert denied, 456 U.S. 973 (1982). Judge Costantino found that the Mastrangelo standard was appropriate.

In Mastrangelo, the trial court "understandably believed" that the defendant was responsible for the death of a critical government witness three days into trial. Id. at 950. The Second Circuit, concerned that a higher standard of proof "would require weeks or even months that would itself ultimately require a mistrial," concluded that

> the test must be simply whether at the time the trial judge is faced with the question he reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at least where, as here, the Government is totally without fault and the case cannot proceed and the ends of justice be served by the evidence already introduced or otherwise available to the Government.

Id. at 951-52.

Judge Costantino reasonably concluded that such an exigency existed in this case, which, after a protracted and

arduous nine-month trial, was near completion. His election to use the Mastrangelo standard will not be second-guessed by this Court. See United States v. Aiello, 771 F.2d 621, 629 (2d Cir. 1985) (trial judge entitled to "wide discretion" in conducting an investigation into jury tampering).

The defendants also argue that Judge Costantino's decision failed to consider significant evidence and contained misstatements of fact. Specifically, they argue that the court did not consider the jurors' responses to the questions on voir dire. As Judge Costantino's opinion, however, makes abundantly clear, he did indeed consider the jurors' responses: "If the Court believed that the voir dire resolved the Governments' allegations, the inquiry would have ended there. The voir dire

did not solve the issue to the court's satisfaction, however, and additional proceedings were clearly warranted." United States v. Ruggiero, supra, at 3.

The defendants take the court to task for failing to "give credence to [the jurors'] claim that no one had tried to influence them." Defendants' Memorandum of Law, supra, at 18-19. The court's broad discretion, however, clearly includes the right -- indeed the duty not to blithely accept all jurors' disclaimers at face value. See Irvin v. Dowd, 366 U.S. 717, 724-25 (1961); Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980). It is fatuous to presume that jurors could be truthful and candid about accepting a bribe or being otherwise compromised by defendants. Judge Costantino's conclusion that he was

not satisfied with the voir dire was more than warranted.

Next, the defendants claim that Judge Costantino's findings of fact are clearly erroneous because he credited the testimony of Gary Barnes, conversely, and did not credit statements made by William Sewell to the grand jury denying any illegal activity. This, of course, is simply a credibility question; and this Court is not disposed to second-guess the judgment of so experienced and seasoned a trial judge as Judge Costantino.

Similarly unfounded is defendants' claim that there was no evidence that Sewell followed Barnes into the parking lot./2 Defendants' final argument on this point is that the court was "egregiously incorrect" in concluding that "Sewell's truthful response to Barnes, that he was a private

investigator, is evidence of his guilt." Defendants' Memorandum of Law, supra, at 23. The Court, however, made no such finding. Rather, Judge Costantino found that "[i]t would bespeak ill of Sewell's skills as an experienced investigator and former New York City detective, however, if he responded untruthfully with an answer that could be so easily verified that it might unveil the defendants' stratagem in an instant." United States v. Ruggiero, supra, at 6. Read in the context of the full paragraph and the accompanying footnote,/3 it is clear that Judge Costantino did not conclude that the statement was evidence of guilt, but rather it was not evidence of Sewell's innocence. These are quite different propositions that defendants' fallacious reasoning totally obscures.

The enumerated alleged errors above are not clearly erroneous, the standard that the parties agree is appropriate./4 After hearing and considering all the evidence presented to him, Judge Costantino found a "manifest necessity" to declare a mistrial based on a "distinct possibility" that the defendants had tampered with the jury. That conclusion is fully justified.

2. Insufficient Number of Impartial Jurors

The second foundation for Judge Costantino's conclusion that the "manifest necessity" standard was satisfied was his finding that three of the jurors could no longer be impartial. It should be remembered that there were only two remaining alternate jurors. Defendants attack this conclusion, arguing that the jurors were excused

improperly and that the mistrial was manipulated by Judge Costantino and the government. Neither argument has merit.

As it must, "[e]ach case must turn on its own facts, and the essential question is whether the jurors retained the requisite impartiality." United States v. Gigante, 729 F.2d 78, 82 (2d Cir.), cert. denied, 467 U.S. 1206 (1984) (citing United States v. Persico, 425 F.2d 1375, 1382 (2d Cir.), cert. denied, 400 U.S. 869 (1970)).

Asking this "essential question," it is patent that Judge Costantino, who was "in the best position to make such an evaluation", id. was well within his discretion in concluding that the jurors had to be excused. A brief review of the transcript of the proceeding demonstrates why.

On voir dire Juror Number Four stated: "I have been thinking about it and I still at this point don't know whether I could be impartial." Transcript of January 15, 1988, at 10,445. Juror Number Eight Stated: "But the subject of drugs comes up as an indictable offense. In the drug issue, that is not one subject I will be objective on." Id. at 10,453. Asked by the court whether he could be fair and impartial, Juror Number Eight responded: "Not on the subject of drugs based on my immediate family experiences involving my children." Id. Finally, Juror Number Twelve flatly admitted that he could no longer be fair, even though the defendants had not yet opened their case:

> THE COURT: And is putting those pieces together you said you could not be impartial?

JUROR NUMBER TWELVE: Yes.

THE COURT: And you could not sit in judgment?

JUROR NUMBER TWELVE: No, I couldn't.

THE COURT: You couldn't be fair?

JUROR NUMBER TWELVE: No. And I am fair and it is very, very hard to be.

Id. at 10,471.

Giving Judge Costantino's determination the deference it deserves, I can perceive no abuse of discretion in his conclusion that the jurors had now lost their impartiality and had to be excused. See Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1983) Rushen v. Spain, 464 U.S. 114, 120 (1983); United States v. Bufalino, 576 F.2d 446, 451-52 (2d Cir.), cert. denied, 439 U.S. 928 (1978). It is telling that the defendants conceded as much in their post-hearing

memorandum. See Defendants' Joint Memorandum in Response to Government's Request for Factual Findings and the Declaration of a Mistrial, January 21, 1988, at 34-42. Indeed, in light of the defendants' statements that they did not oppose dismissing Jurors Four, Eight and Twelve, Judge Costantino was, as a practical matter, left with no alternative but a mistrial. Without a sufficient number of jurors to proceed with the trial, there was a "manifest necessity" to declare a mistrial. See Dunkerly v. Hogan, supra, 579 F.2d at 148 n.7; United States v. Potash, 118 F.2d 54, 56 (2d Cir.), cert. denied, 313 U.S. 584 (1941).

Defendants also seek to damn the government and Judge Costantino for the circumstances leading up to the mistrial. The en banc panel, of which I was a

member, concluded, however, that the publicity arising from the jury tampering proceedings was not due to any conduct by the government. Without deciding whether Judge Costantino should have closed the court for the hearing on jury tampering, (a decision not to be reached lightly see Press-Enterprise Co. v. Superior Court, 106 S.Ct. 2735, 2743 (1986)), the defendants vigorously opposed the only other viable alternative -- sequestration, as requested by the government. Although the Court was not closed and the jurors were not sequestered, this did not inhibit one defense counsel from making a prejudicial statement to the press that was reported in the local newspapers and broadcast on the evening news. See Affidavit of Robert P. LaRusso in Support of Motion for Change of Situs for Trial, February

11, 1988, at Exhibit 2. The media attention the proceedings attracted must be laid squarely at the feet of certain defense counsel.

3. Defendants Reiter, Ansourian, LoPresti, Moscatiello, Anthony Gurino and Caesar Gurino

In a separate motion to preclude retrial, defendants Reiter, Ansourian, LoPresti, Moscatiello, Anthony Gurino and Caesar Gurino, make two additional arguments. Both arguments are founded on Judge Costantino's alleged failure to consider "simple and obvious alternatives to the declaration of a mistrial." United States v. MacQueen, 596 F.2d 76, 83 (2d Cir. 1979); see United States v. Klein, 582 F.2d 186, 194-95 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979). First, they contend that Judge Costantino erred in failing to consider

proceeding with the prosecution against them before an eleven-member jury. Second, they maintain that because they were never alleged to have participated in the jury tampering, double jeopardy attaches to prevent their retrial. I reject both arguments.

Eleven-member juries are authorized by Fed. R. Crim. P. 23(b), which provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds necessary to excuse a juror, for just cause after the jury has retired to consider its

> verdict, in the discretion of the court a valid verdict may be returned by the remaining jurors.

The rule makes clear that a jury of fewer than twelve may render a valid verdict only if the parties agree in writing. None of the defendants tendered such a stipulation to the government or the court. Even if they had done so, it is unlikely, given the allegations of jury tampering, that the government would have stipulated. The court has discretionary power to proceed absent a written stipulation only after the jury has begun deliberations. See id.; Note, Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 23(c), 55 Fordham L. Rev. 861, 862-63 (1987); see also Fed. R. Crim. P. 23 advisory

committee note, 1983 amendment ("if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors"). Without a written stipulation, Judge Costantino had no alternative but to declare a mistrial.

Relying heavily on United States v. Glover, 506 F.2d 291 (2d Cir. 1974), these defendants also argue that a mistrial that is neither for the benefit of the defendant nor is precipitated by him prevents retrial under the double jeopardy clause. In Glover, the Second Circuit found that double jeopardy barred a retrial of the defendant Glover after he was severed involuntarily four days into a multi-defendant trial because a trial that included Glover with other

defendants would have violated the rule set forth in Bruton v. United States, 391 U.S. 123 (1968).

The holding of Glover, however, is not as broad as the defendants read it. What precipitated the mistrial in Glover was the prosecutor's failure "to avail himself of his right under amended Rule 14 of the Criminal Rules to show the statement of the defendant to the judge (in camera if necessary) for a Bruton ruling before trial." Glover, supra, 506 F.2d at 298 (footnote omitted). A mistrial was declared by Judge Costantino in this case because of the irrevocable damage caused to the jury by the defendants and the inability to proceed with only eleven jurors.

Unlike Glover, the government cannot reasonably be accused of causing the mistrial in this prosecution. The

government in Glover could have continued the first trial without using the statements that presented the Bruton problem. No similar option was presented here. There simply was no way to salvage this tainted jury for some of the defendants. Cf. United States v. Chase, 372 F.2d 453, 466 (4th Cir.) (double jeopardy did not attach to defendant Roy in a three-defendant trial where mistrial was declared because the jury read prejudicial newspaper stories, notwithstanding that Roy's verdict was to be rendered by the court), cert. denied, 387 U.S. 907 (1967); Scott v. United States, 202 F.2d 354, 355 (D.C. Cir.) (double jeopardy aid not attach to one defendant in a four-defendant trial despite "circumstances which gave rise to the mistrial revolved about the other three defendants"), cert. denied, 34 U.S.

879 (1952). That these six defendants were not severed from the trial initially is of no consequence: the government did not learn until several months into trial that efforts were being made by some of the defendants to compromise the jury who would render the verdict on behalf of all.

Based on the foregoing, I conclude that there was a manifest necessity to declare a mistrial based on both jury tampering and an insufficient number of jurors. A retrial of this action is not barred by the double jeopardy clause of the fifth amendment.

II. NECESSITY FOR ADDITIONAL PROCEEDINGS

The defendants, in the alternative, seek a hearing on the issue of the government's intent in seeking a mistrial and an interview of the now-discharged jurors. At the heart of

these requests is defendants steadfast belief that the government was motivated by bad faith in demanding the hearing on jury tampering. Although the defendants did not move for a mistrial, support for their request for a hearing on the government's intent is founded on Oregon v. Kennedy, 456 U.S. 667, 674 (1982); and United States v. Dinitz, 424 U.S. 600, 611 (1976). Defendants allege that intentional misconduct on the part of the government caused the mistrial that was granted on the government's motion.

A careful review of the record in this case clearly indicates that no such intentional misconduct occurred. The record amply supports a conclusion that the government had a bona fide concern about the existence of jury tampering based on the defendants' conduct, the reliable confidential information it

received and the independent evidence corroborating that information. The defendants have also failed to allege sufficient facts regarding prosecutorial misconduct to justify a hearing. See United States v. Rivera, 634 F. Supp. 204, 212 (S.D.N.Y.), aff'd, 802 F.2d 593, 599-600 (2d Cir. 1986).

I also find no merit in defendants' request to interview the jurors, presumably to buttress their argument that the government acted in bad faith. These jurors have been "interviewed" twice already by Judge Costantino; and the defendants had an opportunity to request that certain questions be put to them. See, e.g., Transcript of January 15, 1988, at 10,464-66, 10,479-71. I am convinced that interviews conducted at this late date would not uncover anything material,

and, in any event, would not undermine Judge Costantino's findings. Accordingly, defendants' request to interview the jurors and for hearing to discern the intent of the government in commencing a hearing on the jury tampering issue is denied.

III. ANONYMOUS JURY

Although the practice of empaneling an anonymous jury may be unconstitutional in some cases, such a precautionary measure may be necessary when "the defendant's interest in avoiding erosion of the presumption of innocence" is outweighed by "the government's interest in safeguarding jurors." United States v. Thomas, 757 F.2d 1359, 1365 (2d Cir.), cert. denied, 474 U.S. 819 (1985).

To determine whether an anonymous jury is warranted there must exist first,

a "strong reason to believe the jury needs protection." Second, precautionary measures must be taken to "minimize the effect that such a decision might have on the jurors' opinions of the defendants." Id. In this case, defendants Ruggiero, Gotti and Carneglia consent to the empanelment of an anonymous jury. Absent this consent, however, I would have found that an anonymous jury is appropriate. See Thomas, supra, 757 F.2d at 1365; United States v. Persico, 621 F. Supp. 842, 879 (S.D.N.Y. 1985).

In presenting this procedure to the venirepersons, I will give them the "intelligent, reasonable and believable" explanation used by Judge Pollack in United States v. Fisher, 83 CR 150 (S.D.N.Y. 1983), and approved by the Second Circuit in United States v. Thomas, supra, 757 F.2d at 1365 n.1.

During the retrial of this action, the Court also will direct the United States Marshal Service to (1) transport the jurors to and from the courthouse in a manner that I find will maintain the jurors' anonymity and (2) escort the jurors as a group during recesses and lunch to prevent mingling with the public.

IV. CHANGING THE SITUS OF THE TRIAL

The government moves to change the situs of the trial for two reasons.

First, the media coverage of the previous trial and the mistrial proceedings may have harmed the parties' ability to receive a fair trial in Brooklyn. The change of trial location would enable the parties to select jurors from Nassau and Suffolk Counties, who, according to the government, have been exposed to less publicity about the case

than jurors drawn from the Brooklyn panel.

Second, the government argues that removal to Uniondale will hamper defendants' ability to identify anonymous jurors and seek to tamper with their verdict. The government alleges that the geographic area most affected by the daily activities of the Gambino family, of which Ruggiero and Gotti are alleged to be members, is New York City, notwithstanding that Ruggiero and Gotti reside in Nassau County.

Fed. R. Crim. P. 18 provides that "the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." The

Rule does not mean, however, that when a district is divided into divisions the trial of an action must take place within the division of the district in which the offense was committed. See Fed. R. Crim. P. 18 advisory committee note, 1979 Amendment. It thus does not violate the sixth amendment or the first sentence of Rule 18 for a trial to take place anywhere within the district where, as here, the district is not subdivided into divisions. United States v. Fernandez, 480 F.2d 726, 731 (2d Cir. 1973).

The government maintains that the considerations enumerated in Rule 18 are satisfied and the defendants will not be inconvenienced because Gotti resides in Nassau County, Carneglia resides in Eastern Queens County, and Ruggiero is in custody at the Metropolitan Correctional Center in Manhattan and will be

transported to the courthouse by U.S. Marshals. Defendants disagree. All defense counsel have offices in Manhattan, some thirty traffic-congested miles from Uniondale. Unlike Brooklyn, there also exists no direct access to the Uniondale courthouse via mass transit. Counsel's daily travel to and from Uniondale would consume a substantial amount of time that otherwise could be used to consult with the defendants. The risk that the defendants, particularly Ruggiero, would not be able to confer adequately with their counsel militates against a change of situs.

The government also argues that transferring the trial to Uniondale would reduce the risk that a prospective jury panel has been, and would be, exposed to media attention given to the first trial and these defendants. See United States

v. Mase, 556 F.2d 671, 676 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978). Jurors selected from Nassau and Suffolk counties, however, are exposed to substantially identical media sources as those selected from Brooklyn, Queens, and Staten Island. Thus, I cannot conclude that the risk of prejudice from media attention would be appreciably different to overcome the inconvenience suffered by the defendants in this case. In addition, any alleged enhanced ability to influence jurors from New York city proper, as opposed to Nassau and Suffolk counties, can be cured by the employment of properly administered procedures designed to maintain the anonymity of the jurors. Accordingly, the government's motion to change the situs of the trial is denied.

CONCLUSION

Defendants' motion for an order barring their retrial on the ground that it violates the double jeopardy clause of the fifth amendment is hereby denied. Defendants' motion for an interview with the jurors and a hearing on the government's intent in moving for a mistrial is hereby denied. The government's motion for an anonymous jury is hereby granted. The government's motion for a change of situs for the trial is hereby denied.

The government and counsel for defendants Ruggiero, Gotti and Carneglia are directed to pick up the Court's proposed jury questionnaire in chambers after 3:00 p.m. on March 2, 1988 and have their objections to the questionnaire prepared and presented to the Court at a status conference that will be held at

9:30 a.m. on March 4, 1988. Selection of the anonymous jurors will commence on March 14, 1988 at 9:30 a.m.

SO ORDERED.

Dated: Brooklyn, New York
March 1, 1988

/s/_____
JOSEPH M. McLAUGHLIN, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

FOOTNOTES

1. This request was the result of the defendants' assertions made in court and to the press that the government's motivation for commencing the jury tampering proceedings was the government's belief that it was losing the case.

2. Barnes' testimony on this issue reads:

> Q. And where, exactly were you when your first saw the person in Government Exhibit 4 [Sewell]?
> A. I remember I just entered the parking lot and I was probably about 100 feet into the parking lot and then he came up behind me, literally side by side, like walking pretty fast and that's when I spotted him.
> Q. He had been behind you before you got into the lot?
> A. Correct.

3. The full text of Judge Costantino's findings on this point is as follows: "The defendants also make much of the fact that Sewell truthfully told Barnes that he was a private investigator in response to Barnes's question/3. It would bespeak ill of Sewell's skills as an experienced investigator and former New York City detective, however, if he responded untruthfully with an answer

that could be so easily verified that it might unveil the defendants' stratagem in an interest."

United States v. Ruggiero, supra, at 6.

> The defendants also place much reliance on Sewell's statement to the grand jury that he was not retained by the defendants in this case and that he has not taken steps to identify jurors in this case. It would not be surprising if Sewell was less than candid in these statements, however, given his acknowledged closeness to the Gotti family and Angelo Ruggiero. See generally Grand Jury testimony of William Sewell.

Id. at i n.3.

4. See Mastrangelo, supra, 662 F.2d at 952; see also United States v. Gotti, 794 F.2d 773, 778 (2d Cir. 1986) (clearly erroneous standard applies to findings of fact in pretrial hearings using the preponderance standard).

Supreme Court, U.S.
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OCT 31 1988
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CLERK

No. 88-374

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANGELO RUGGIERO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a mistrial was justified in light of the high likelihood that the jury had been compromised as a result of unlawful conduct attributable to petitioners and the fact that only 11 jurors remained after three were excused when they expressed doubts about their impartiality.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 846 F.2d 117. The district court's order granting a mistrial (Pet. App. 66a-87a) is reported at 678 F. Supp. 46. The district court's denial of petitioners' motion to bar a retrial (Pet. App. 88a-143a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1988. A petition for rehearing was denied on June 1, 1988. On August 4, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 30, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Angelo Ruggiero, Gene Gotti, and John Carneglia were charged in a 12-count superseding indictment with engaging in a continuing criminal narcotics enterprise in violation of 21 U.S.C. (& Supp. IV) 848. The indictment also charged them, together with petitioners Edward Lino, Mark Reiter, Joseph LoPresti, Anthony Moscatiello, Oscar Ansourian, Anthony Gurino, and Cesar Gurino, with conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d), and with other offenses involving narcotics trafficking and the obstruction of a grand jury investigation. After seven and a half months of trial, the trial court declared a mistrial (Pet. App. 66a-87a). The case was reassigned to another district judge, who denied petitioners' motion for an order barring their retrial on double jeopardy grounds (*id.* at 88a-133a). Petitioners took an interlocutory appeal from that order, and the court of appeals affirmed (Pet. App. 1a-63a).

1. Petitioners' trial began on June 1, 1987, before Judge Mark L. Costantino and an "anonymous" jury.[1] In October 1987, the United States Attorney obtained information from confidential sources that certain of the petitioners had identified members of the anonymous jury for the purpose of influencing the verdict and that one juror had been approached and compromised. Pet. App. 6a-7a. A grand jury began an investigation of the matter (*id.* at 7a).

On December 8, 1987, while that investigation continued, juror Gary Barnes was excused from the jury when it was discovered that he was not a United States citizen.

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[1] Jury selection had begun in April. In order to protect the members of the venire and the jurors who were eventually seated, neither the prosecution nor the defense was advised of their identities.

Two days later, Barnes received a phone call from a co-worker, Melvin Rosenberg. Rosenberg pressed Barnes to meet him. When the two got together later that day, Rosenberg told Barnes that he was a long-time friend of petitioner Gotti and, apparently believing that Barnes was still on the jury, suggested that Barnes could have a BMW automobile if he told Rosenberg how the jury was "feeling." See Pet. App. 7a-8a.

2. On Thursday, January 7, 1988, the government filed an ex parte motion, accompanied by affidavits setting forth the government's information regarding possible jury tampering and reports that four petitioners had previously obstructed judicial and law enforcement processes (Pet. App. 10a-11a). The motion asked the trial court to question the members of the jury in camera concerning whether they had been approached and then to conduct an evidentiary hearing into the possibility of jury tampering. The following Monday, January 11, the trial court examined each of the jurors in chambers outside the presence of all counsel (*id.* at 11a). Except for one juror, who said that someone at work knew that she was on petitioner Ruggiero's jury, none of the jurors admitted to having been approached (*id.* at 12a). Petitioners received the transcript of the jury voir dire and the government's papers the next day (*ibid.*). On January 13, the trial court began a hearing on the jury-tampering issue. Before it began, the government and the defense requested that the hearing be closed to the public (*id.* at 12a). When the court declined to rule on this request, the government moved to sequester the jury (*ibid.*). Petitioners opposed that motion (*ibid.*). Ultimately, the jury was sequestered after the second day of the hearing (*id.* at 18a).

At the hearing, the court received an affidavit from an FBI agent setting forth confidential information that petitioners Carneglia, Gotti, Ruggiero, and Lino had taken

measures to identify members of the anonymous jury in order to fix the case (Pet. App. 73a). According to the affidavit, those defendants had retained a private investigator, William Sewell, to perform computer searches of the license plate numbers of the cars in which the jurors were observed (*ibid.*). After having a falling out with Sewell, these petitioners used a different investigator (*id.* at 6a). The agent's affidavit related that five jurors had been identified and one had been approached and compromised (*id.* at 73a-74a).

Former juror Barnes testified at the hearing and identified Sewell from a photograph as a person he had seen in the courtroom on several occasions (Pet. App. 75a).[2] He also testified about an encounter with Sewell, who once followed him into a parking lot that was used by several of the jurors (*id.* at 14a, 75a-76a).

Barnes worked at REFCO, a brokerage house that records its employees' phone calls in the regular course of its business. At the hearing, the government introduced a recording of the telephone call placed to Barnes by Rosenberg, who also worked at REFCO (Pet. App. 77a, 14a-15a, 36a-39a). After Rosenberg identified himself, he asked Barnes to meet him. When Barnes asked Rosenberg what he wanted to talk about, the conversation continued (*id.* at 37a-38a):

> Rosenberg: No, no, no, not on the phone. I want to talk to you.
>
> Barnes: You want . . . I tell you what, can I call you back from the pay phone?
>
> Rosenberg: I won't speak to you on the phone.

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[2] On one occasion, Barnes saw Sewell speaking with petitioner Gotti's attorney (Gov't C.A. App. 62, 127-128).

> Barnes: Uh?
>
> Rosenberg: I won't speak on the phone. This phone is taped here.

Barnes saw Rosenberg later in the day. After again refusing to explain what he wanted to talk about, Rosenberg took Barnes to a small conference room and began to press him about "a case in Queens," asking Barnes "how the jury [was] feeling" (Pet. App. 16a). Barnes said that he was not on jury duty in Queens, but rather in Brooklyn (*ibid.*). Rosenberg persisted, Barnes continued to profess ignorance, and the conversation continued (*id.* at 16a-17a):

> Rosenberg said, "I am just going to give you initials, right, and this case is about drugs. * * * Initial is G.G." Barnes reiterated that he was not on a jury in Queens. Rosenberg said, "Okay, okay, Gene Gotti." Again Barnes said, "I don't know what you are talking about. I am not in Queens." Rosenberg said,
>
> > I have known this kid for 42 years. I have known his family. We are good friends. I know his three daughters and everything. I just want to know what the jurors are thinking. I know this guy is probably going to get convicted, going to go to jail. . . . [T]he Government is probably going to try to put this guy away for a long time because of his brother.
>
> Rosenberg then mentioned a new BMW and asked [Barnes] what kind of car he drove. Barnes said that he did not need a car and walked out of the room.

Barnes testified that he had not told Rosenberg that he was serving on the jury in the Gotti case (*id.* at 17a).

An FBI agent testified that he had questioned Rosenberg on December 22. Rosenberg admitted speaking with Barnes, but said it was "a lark." He denied mentioning the

initials "G.G." or the name "Gene Gotti," and he claimed that he did not know Gene Gotti other than from the newspapers (Pet. App. 8a, 79a). Rosenberg also told the agent that he and Barnes were extremely close, like father and son (*id.* at 18a). Barnes testified, by contrast, that he and Rosenberg were not close friends, but had only met casually in the halls and spoken once or twice on the phone about orders at REFCO (*id.* at 15a). The transcript of their earlier phone conversation reflected that Barnes did not recognize Rosenberg until after the latter had identified himself (*id.* at 77a). At the end of the interview, the agent served Rosenberg with a subpoena requiring him to appear before the grand jury the following day.

The government introduced recordings of several of Rosenberg's phone conversations on the day he was served with the subpoena. In those conversations, Rosenberg, again expressing a reluctance to explain his purpose while on the phone, spoke with attorney Charles Carnesi and arranged for Carnesi to contact a second attorney, Brian Levinson. The calls suggested that Carnesi was to orchestrate—in Rosenberg's words, "lay out the groundwork" for—Rosenberg's appearance before the grand jury, while Levinson would accompany him (Pet. App. 9a-10a; see *id.* at 81a). Carnesi had earlier represented William Sewell before the grand jury.[3] When interviewed by the FBI, hours before speaking with Carnesi on the phone, Rosenberg claimed that the only lawyers he knew were his brother-in-law and Levinson (*id.* at 8a).

On the third day of the hearing, the trial court reexamined the jurors individually in open court. During

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[3] Sewell had discussed his subpoena with petitioner Ruggiero at the Metropolitan Correctional Center, while Carnesi was present (C.A. Jt. App. A230-A235). When interviewed by the FBI, Rosenberg denied knowing Sewell (Gov't C.A. App. 151-152).

that voir dire, three jurors expressed doubts about their ability to remain impartial (Pet. App. 18a). Juror No. 4 reported that his father had seen a press report of the hearing and had expressed concern to him about it; the juror said that "at this point [I] don't know whether I can be impartial" (*id.* at 43a-44a).[4] Juror No. 8 admitted that he had learned of the allegations of jury tampering. He stated that he could not be impartial "on the subject of drugs based on immediate family experiences involving my children and so forth" (*id.* at 18a-19a, 45a, 49a). Juror No. 12 stated that it would be difficult for her to be impartial because she had "put pieces together" (*id.* at 19a, 51a-52a).

3. At the government's request, the judge withheld decision on what course to follow until after the parties had had an opportunity to file memoranda. On January 19, the government moved for a mistrial. It argued that Juror No. 4, Juror No. 8, and Juror No. 12 had to be excused, and it asked that the court make a finding that there was a "manifest necessity" for a mistrial because the dismissal of those jurors would leave too few jurors to proceed further and because petitioners had tampered with the jury (Pet. App. 19a). Petitioners filed a joint memorandum which agreed that "circumstances 'necessitated [the] dismissal' of Jurors 4, 8, and 12" (*id.* at 20a), but opposed the findings sought by the government.

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[4] That juror had previously asked to see the judge and had volunteered that his father had recounted press reports of the trial and "got very nervous when he heard that the defendants might know who we are" (Gov't C.A. App. 161). Juror No. 4 also said that his mother had the "same attitude" and that both his parents were "panicked" (*ibid.*). He also said that he felt "that if our anonymity has been broached [*sic*] we are in a certain amount of danger, and whether or not that would affect my decision I don't know. * * * Personally it wouldn't bother me. Again, I have a family, and I live right in the neighborhood where most of these things happened" (*ibid.*).

4. On January 21, the United States District Court for the Eastern District of New York convened en banc to consider petitioners' allegations that the United States Attorney, believing that the government was losing at trial, had made charges of jury tampering to force a mistrial (Pet. App. 20a).[5] The court ordered the government to produce the minutes of the grand jury, reviewed the record of the proceedings before the trial judge, and heard oral argument. The en banc court found that the grand jury proceedings were bona fide, and that the United States Attorney had good reason to bring the jury tampering allegations to the trial judge's attention (*id.* at 20a-21a). The court also concluded that any publicity that resulted from the government's application was not the fault of the United States Attorney (*id.* at 21a). The court left to the trial judge the questions whether and when to order a mistrial (*ibid.*).

5. The trial court declared a mistrial (Pet. App. 66a-87a). After recounting the course of the proceedings before it, the court indicated that it would apply the standard of proof set out in *United States* v. *Mastrangelo,* 662 F.2d 946 (2d Cir. 1981), cert. denied, 456 U.S. 973 (1982). In that case, in which an essential witness had been murdered on the way to court, the Second Circuit had stated that a mistrial could be granted if the trial judge "reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at least * * * where the Government is totally without fault and the case cannot proceed and the ends of justice be served * * *" (Pet. App. 68a). In light of the

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[5] Petitioners had raised these allegations in proceedings before Judge Costantino, and counsel for petitioner Gotti had repeated them in a television interview before the jury was sequestered (Gov't C.A. Br. 13).

"exigency of determining whether to proceed with the trial and the obvious constraints placed upon [its] ability to fully explore" allegations of jury tampering at a short hearing, the trial court saw "no reason to depart from the standard enunciated in *Mastrangelo*" (*id.* at 69a). It also rejected petitioners' contention that the jurors' answers during voir dire precluded a finding of jury tampering (*id.* at 70a).

The trial court adopted the en banc court's ruling on the question whether the government had acted in bad faith in seeking a mistrial (*id.* at 71a). It declined to make a determination concerning the weight of the evidence of petitioners' guilt or innocence of the crimes charged in the indictment, stating only that the severity of the charges and the possible sentences they carried provided petitioners with "ample motive to tamper with the jury" (*id.* at 72a).

Turning to the merits of the jury tampering issue, the court found (*id.* at 72a):

> Based upon the evidence adduced at the hearing and the materials submitted by the Government, the Court finds that there is a very high degree of likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants.

The trial court next reviewed the evidence introduced at the hearing, rejecting in detail various factual contentions advanced by petitioners. Specifically, it found ex-juror Barnes to be "completely trustworthy" (*id.* at 74a), rejected Rosenberg's account of his relationship with Barnes and the tenor of their conversation (*id.* at 79a-80a), and found that it was "evident * * * that [Rosenberg] was acting on behalf of Gene Gotti when he contacted Gary Barnes" (*id.* at 80a-81a). The trial court held that "there is

a manifest necessity to declare a mistrial in this case due to the defendants' efforts to improperly identify and influence the jury" (*id.* at 81a-82a).

The trial court also found that there was manifest necessity for a mistrial "because there is an insufficient number of jurors who can deliberate fairly and impartially" (Pet. App. 82a). The court explained that it believed the statements of Juror No. 4, Juror No. 8, and Juror No. 12 that "they could no longer remain fair and impartial" and that with their dismissal there remained an insufficient number of jurors to proceed further (*id.* at 82a-83a).

6. Following the mistrial, the case was reassigned to Judge Joseph M. McLaughlin. Petitioners moved for an order barring their retrial on double jeopardy grounds. The district court denied that motion (Pet. App. 88a-143a). With respect to the jury tampering issue, the court refused to "second-guess" the trial court's use of the *Mastrangelo* standard and rejected various challenges to the trial court's findings of fact (Pet. App. 114a-118a). It found the trial court's finding that there had been "manifest necessity" for a mistrial on this ground to be "fully justified" (*id.* at 118a). Similarly, after reviewing the transcript of the voir dire, the district court concluded that "[g]iving Judge Costantino's determination the deference it deserves, [it could] perceive no abuse of discretion in his conclusion that the jurors had now lost their impartiality and had to be excused" (*id.* at 121a). The district court also relied on the fact that the defendants "conceded as much in their post-hearing memorandum," which "as a practical matter," left the trial court "with no alternative but a mistrial" (*id.* at 121a, 122a). The district court rejected contentions that the government or Judge Costantino had been responsible for the circumstances leading up to the mistrial (*id.* at 123a).

Finally, the district court rejected the argument of certain of the petitioners, advanced for the first time in their separate memorandum, that the trial court should have allowed the trial to continue with an 11-person jury and that allegations of misconduct directed at other petitioners did not warrant a mistrial as to them (Pet. App. 124a-127a). The option of an 11-person jury was not available, the district court explained, because Fed. R. Crim. P. 23(b) requires all parties to stipulate in writing with the court's approval to a jury with fewer than 12 members, none of the defendants had tendered or even proposed such a stipulation, and the government was unlikely to have joined one in any event (*id.* at 126a).

7. The court of appeals affirmed by a 2-1 vote (Pet. App. 1a-63a). It upheld the trial court's use of the *Mastrangelo* standard, explaining that its rationale—"namely, to avoid a mini-trial which could last weeks or months and maximize the risk of alerting the jury to the allegations of misconduct"—was applicable to allegations of jury tampering (Pet. App. 27a). The court agreed with both district judges that "the evidence did raise a 'distinct possibility' that [petitioners] had identified several of the anonymous jurors and had tried to influence one or more of them" (*id.* at 28a).

While characterizing the question as a "closer one," the majority also held "that the [trial] court properly dismissed the three jurors, especially when we weigh their responses to the court's questions in light of the evidence of jury tampering" (*id.* at 29a-30a). Further, it ruled that once those jurors were dismissed, the trial court could properly find that a mistrial was necessary (*id.* at 31a-32a). Like the district court, the court of appeals relied on the fact than none of the petitioners had suggested that the case could proceed with fewer than 12 jurors until after the jury had been discharged and that the government would

have been unwilling to agree to that course (*id.* at 32a-33a). Finally, the majority rejected the claim that certain of the petitioners, those not specifically charged with jury tampering, were entitled to have their trial continue and also held that petitioners' allegations of prosecutorial misconduct were not sufficiently colorable to warrant a hearing on the prosecution's motives (*id.* at 34a-35a).

Judge Lumbard dissented (Pet. App. 53a-63a). In his view, the responses of Juror No. 4, Juror No. 8, and Juror No. 12 fell short of providing a basis for disqualifying any of them (*id.* at 55a). It was the trial court's duty, Judge Lumbard stated, to urge the jury "to continue to serve and to consider the case solely on the evidence" (*id.* at 55a, 58a). Judge Lumbard also criticized the trial judge's decision to examine the jurors in open court (*id.* at 55a; see *id.* at 58a). While acknowledging that "it [was] doubtful whether the defendants would have agreed" to proceed with an 11-person jury, he also maintained that the trial judge had not taken "every reasonable step" to continue the trial on that basis (*id.* at 62a). With respect to the issue of jury tampering, Judge Lumbard concluded that there was "no showing that any remaining member of the jury had been tainted or even approached" (*ibid.*). The combination of these factors and "the judge's remarks about his displeasure regarding the trial" led Judge Lumbard to the conclusion that there "was no showing of 'manifest necessity' to justify the declaration of a mistrial" (*ibid.*).[6]

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[6] Petitioners Ruggiero, Carneglia, and Gotti were retried earlier this year, but their trial ended in a mistrial after the jury was unable to reach a verdict. Retrials for all petitioners are scheduled for early next year.

ARGUMENT

The court of appeals found that there were two sufficient grounds for a mistrial in this case—a "very high degree of likelihood" of jury tampering attributable to the petitioners and the need to excuse three jurors who questioned their own impartiality. Both holdings conform to this Court's prior decisions and the balance they strike between a defendant's right to have his trial completed before a single jury and "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689 (1949). Petitioners' challenges to the trial court's factual findings and its decision to declare a mistrial do not raise any issue of general importance requiring further review.

1. As all of the courts below acknowledged, a prosecutor "must demonstrate 'manifest necessity' for a mistrial declared over the objection of the defendant." *Arizona* v. *Washington,* 434 U.S. 497, 505 (1978). Although the government's burden under this standard "is a heavy one" (*ibid.*), it must be applied in light of the particular facts before the trial court (*id.* at 506). For that reason, the application of the "manifest necessity" standard is committed, for the most part, to the trial judge. "[T]he overriding interest in the evenhanded administration of justice requires that [an appellate court] accord the highest degree of respect to the trial judge's evaluation of the likelihood" that one or more jurors' impartiality has been affected by events in a trial (*id.* at 511).

It is difficult to imagine a circumstance that more clearly justifies a mistrial than an attempt to tamper with a sitting jury. Jury tampering denies the prosecutor his "one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington,* 434 U.S. at 505. The trial court found that there was "a very high degree of

likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants" (Pet. App. 72a).

That finding of fact was not "the bootstrapping of innuendo upon suspicion" (Pet. 39). Rather, as both district judges who heard this matter and the court of appeals found, it was based, inter alia, on: (1) evidence that ex-juror Barnes had been approached by Rosenberg who, acting on behalf of petitioner Gotti and believing that Barnes was still on the jury, had offered him a BMW in return for information about how the jury was "feeling" (Pet. App. 8a, 14a-17a, 78a-79a); (2) proof that Rosenberg had attempted to conceal the purpose of his approach to Barnes and had fabricated an account that misstated the nature of his relationship with Barnes, the substance of their conversation, and the seriousness of his intentions (see *id.* at 8a-9a, 18a, 79a-80a); and (3) information from confidential sources, corroborated to a substantial extent, that petitioners had employed private detectives to breach the anonymity of the jury and had compromised at least one juror (*id.* at 6a-7a, 73a-74a). Against that background, the trial court was not bound by the fact that no sitting juror confirmed that he or she had been approached. As the court of appeals observed, "it is not likely under the circumstances of this case that a juror who had been approached would admit it in open court" (Pet. App. 31a).

Petitioners also challenge the reliance of the courts below on the Second Circuit's prior decision in *United States* v *Mastrangelo, supra.* They argue that the reasoning of that case is not applicable here and that applying the *Mastrangelo* standard in this case "eviscerate[s] the manifest necessity requirement" (Pet. 38-54). We submit that *Mastrangelo* properly describes a trial court's discretion to apply the "manifest necessity" standard in a par-

ticular category of exceptional cases. As the Second Circuit explained, *Mastrangelo* addresses the situation in which a trial judge faced with facts tending to establish a fundamental assault on the fairness of a trial cannot, as a practical matter, "reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month." 662 F.2d at 951. In that situation, when a judge's discretion to declare a mistrial must be exercised without extended factfinding, he may act on the basis of a "distinct possibility" that the fundamental fairness of the proceeding has been subverted by the defendants, "at least where * * * the Government is totally without fault" and "the ends of justice [would] be served" (*id.* at 952).

The circumstances justifying the use of the *Mastrangelo* standard were all present in this case. Jury tampering is a direct assault on the judicial process that requires an immediate response. It would have been totally impracticable for the court to conduct plenary hearings to resolve the questions raised by the government's evidence while reserving the option of proceeding with the trial. As it was, the trial was interrupted for nearly two weeks. Contrary to petitioners' argument (Pet. 44-48), the fact that the government's investigation of attempts to tamper with the jury had begun by October and had not been completed by January did not make *Mastrangelo*'s analysis inapplicable. Once the government had investigated the approach to ex-juror Barnes, which confirmed that efforts were being made to influence the jury, it would have been inconsistent with the government's responsibilities to the proper administration of justice to withhold that information from the court. The court, in turn, was entitled to act expeditiously, rather than to continue putting itself, the witnesses, and the jurors through a trial that had been irrevocably tainted. As in *Mastrangelo,* therefore, the "ends of justice" compelled a prompt response. Finally, as the en banc district court concluded, the government was "totally without fault" in the matter.

There is no inconsistency between *Mastrangelo* and any decision of this Court. The Court has repeatedly rejected the suggestion that "manifest necessity" is a rigid standard, to be applied in accordance with its dictionary definition (see Pet. 50-53). For instance, in *Arizona* v. *Washington, supra,* this Court explained that, "contrary to the teaching of Webster" (434 U.S. at 506),

> those words ["manifest necessity"] do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.

Accord *Illinois* v. *Somerville,* 410 U.S. 458, 462 (1973) ("manifest necessity" standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial"). Moreover, the Court has emphasized that the principles underlying the manifest necessity standard "command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of [these] principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade* v. *Hunter,* 336 U.S. at 691. These principles do not establish any precise standard of proof that was violated in this case.

The decisions of the courts below respect the balance of values underlying the "manifest necessity" standard. "[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. at 689. When there is a "high likelihood" or "distinct possibility" that the fact-

finder has been compromised, as was shown in this case, the public's interest in a fair trial justifies terminating the first proceeding and starting anew.

Apart from the merits, there are several persuasive reasons why this case does not warrant further review. Contrary to petitioners' suggestion that the "distinct possibility" standard threatens to become "a matter of general application" (Pet. 49), it apparently has been applied only three times in this decade—all in the Second Circuit.[7] Those cases were truly extraordinary; they involved, respectively, the murder of a government witness on his way to court, a death threat that led a witness to refuse to testify even after he was jailed for contempt, and an attempt to tamper with a sitting jury. To our knowledge, no other court has ever questioned *Mastrangelo*'s reasoning or its application to these kinds of exceptional circumstances. Since the Second Circuit has applied the *Mastrangelo* standard only in extraordinary cases involving direct attacks on the administration of justice, there is no need for this Court to address the hypothetical question whether that standard should be applied more broadly. Indeed, even if a "distinct possibility" of jury tampering is insufficient to justify mistrial, the finding in this case—that there was a "very high degree of likelihood that the [jury] sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants" (Pet. App. 72a)—met an even higher standard that is consistent with any reasonable view of "manifest necessity."

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[7] In addition to *Mastrangelo* and this case, in *United States* v. *Khait*, 643 F. Supp. 605 (S.D.N.Y. 1986), the government's principal witness refused to testify when his wife received a death threat on the eve of trial. A jury was sworn so that the witness could be held in contempt. When he persisted in refusing to testify, the judge released him and held, relying on *Mastrangelo*, that the defendant could be retried.

2. Even if this Court concluded that the existence of jury tampering was not sufficient to justify a mistrial in this case, there is an alternative ground that supports the decision below—the finding that three jurors had to be excused because their impartiality was in doubt and the trial could not continue with fewer than 12 jurors. The court of appeals held that the district court "properly dismissed" the three jurors who expressed doubts about their impartiality and that "it properly could find that a mistrial was necessary from the number of jurors remaining" (Pet. App. 29a, 31a-32a). That finding, which would justify petitioners' retrial regardless of any disposition of the jury tampering matter, is factbound and plainly unworthy of further review in this Court.

All three of the jurors in question expressed doubt about their ability to act impartially. The trial court heard them personally and was in the best position to evaluate the depth of their misgivings. Under these circumstances, the "compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias" are fully applicable. *Arizona* v. *Washington*, 434 U.S. at 513-514. As this Court explained there (*ibid.*):

> [The trial judge] has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. * * * In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U.S. 684, 687.

Accord *Gori* v. *United States*, 367 U.S. 364, 368 (1961) (trial judge is "best situated intelligently to" consider whether circumstances require a mistrial). These principles preclude second-guessing the trial court in this case. While

Judge Lumbard expressed the view that "obviously uneasy jurors" might view the voir dire as a "way out" (Pet. App. 59a-60a), it was just as likely that the jurors might understate their concerns. They had taken an oath to be impartial and, after more than seven months of trial, might well have believed that they would be criticized for expressing doubts about their ability to continue. Juror No. 4 in particular could well have been reluctant to elaborate fully on his family members' feeling that, if their identities were known, they would be "in a certain amount of danger" (Gov't C.A. App. 161). The trial judge was the only one to observe the jurors and was best situated to interpret their responses. His judgment is entitled to great deference.

Nor is there support in the record for the suggestion that the jurors' responses were the product of being examined in open court. Although both parties suggested conducting their voir dire in chambers, the trial court was under no duty to do so. The transcript of the voir dire does not suggest that any juror was intimidated by the public nature of the proceedings or would have answered any differently in chambers than he or she did in open court.

In this Court, petitioners contend that the trial court failed to explore adequately alternatives to excusing the three jurors and declaring a mistrial. However, in the trial court, petitioners specifically requested that those jurors be excused and thereby abandoned other possible alternatives. After examining the jurors for the second time, the court withheld decision until after receiving submissions from both sides. In the conclusion of their joint memorandum (C.A. Jt. App. A344), petitioners stated, "Jurors 4, 8, and 12 should be excused." [8] Even though it was

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[8] Petitioners joined this request with an argument that the jurors' inability to serve further was the result of misconduct by the judge and

obvious that this relief would reduce the jury to only 11 members, petitioners nowhere suggested that they would be willing to go forward with fewer than 12 jurors. Indeed, given the facts that this alternative could not have been chosen without the government's consent and that the government was seeking a mistrial on the ground of jury tampering, it would not have been a violation of petitioners' rights to reject that course even if petitioners had proposed it. Petitioners cannot now claim that the district court abused its discretion by failing to take steps that they themselves chose not to request.[9]

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the government, saying that if the dismissal of the jurors led to a mistrial, a retrial would be barred (C.A. Jt. App. A336-A343). Their objective was obviously to have the best of both worlds—to put themselves in a position to argue, if the judge chose not to dismiss the jurors, that they had objected to their presence on the jury, while preserving at the same time the contention that they were not parties to a request for a mistrial. Even accepting the proposition that petitioners could both seek the dismissal of the jurors and contend that a mistrial necessitated thereby was "over their objection" for purposes of their double jeopardy arguments, petitioners cannot now be heard to argue that the trial judge erred by failing to consider alternatives that they did not advocate.

[9] The petition asserts that "the defense asked Judge Costantino to resolve by curative instructions the unease of the jurors * * * about their continued ability to serve," including telling them about the "cost of a re-trial to all parties" (Pet. 25). There is no citation supporting this statement, and it completely mischaracterizes two brief and ambiguous interjections by one attorney—"[i]t is something [that can be] cure[d]" and "If you can cure it * * * "—during a colloquy on whether *one* juror (No. 12) should be further examined (C.A. Jt. App. A297-A298). Immediately thereafter, the trial court acquiesced in the government's request for an opportunity to file a memorandum before the court acted. Petitioners' lengthy memorandum nowhere mentioned the possibility of curative instructions and expressly consented to dismissal of all three jurors (*id.* at A301-A344). See also *Arizona* v. *Washington*, 434 U.S. at 511 (trial judge has discretion to decline to give cautionary instruction).

Nor is there any merit to the suggestion in the petition, based on isolated excerpts from the transcript, that the trial judge acted precipitously or from personal motives. See Pet. 17.[10] As the record reflects, the judge conducted a three-day hearing into the issue of jury tampering. He carefully examined the jury twice in terms that were calculated to uncover possible bias while preserving its neutrality if possible. He discharged the three jurors in question and declared a mistrial only after receiving written submissions from both sides. His findings of fact were thorough and his decision was justified with specific reference to the requirement of "manifest necessity" (Pet. App. 81a-83a). Nothing in this record suggests that the trial judge acted "irrationally or irresponsibly." *Arizona* v. *Washington,* 434 U.S. at 514.

3. Finally, petitioners rely heavily on Judge Lumbard's dissenting opinion (Pet. 31-37). He would have held that the government did not establish "manifest necessity" for a mistrial, believing that there was no showing that any sitting member of the jury had been approached improperly, and that the trial judge mishandled the voir dire and failed adequately to investigate alternatives to a mistrial. For present purposes, however, the

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[10] This lengthy trial was unusually rancorous. In an earlier decision upholding petitioner Ruggiero's citation for contempt arising from a courtroom outburst, the Second Circuit described it as a "tense and volatile multi-defendant criminal trial, in which the district court had been forced on other occasions to warn the defendants to stop interrupting witnesses, using foul language, or otherwise showing their disrespect for the proceedings." *United States* v. *Ruggiero,* 835 F.2d 443, 444-445 (2d Cir. 1987). In any event, the issue is whether the record reflects a diligent effort by the trial judge to apply the "manifest necessity" standard to the particular facts before him, with due regard for the values it reflects. Nothing in the excerpts marshaled by petitioners suggests that he did not.

important point is that the dissenting judge's disagreement with the majority was not on the merits of the legal standards applied by either of the district judges or the court of appeals. Rather, it was over the application of those standards to the particular facts of this case. The fact that this case presented close questions below, as the majority acknowledged (Pet. App. 29a), is not enough to justify further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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